John Parnell.
1812.

THE

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OF

FIRE AND LIFE INSURANCE

AND

ANNUITIES,

WITH

PRACTICAL OBSERVATIONS.

PART I.—THE LAW OF FIRE INSURANCE.
PART II.—THE LAW OF LIFE INSURANCE.
PART III.—THE LAW OF ANNUITIES.

BY

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PREFACE.

The Law of Fire and Life Insurance has not hitherto been made the subject of a distinct work, but has been embraced in a few Chapters at the conclusion of Treatises on Marine Insurance. Valuable as these works are upon the latter subject, the former contracts appear to have been less elaborately treated than their general and growing importance appears to deserve. The circumstance may be accounted for by the fact, that these contracts have been, until within a few years, of comparatively confined extent, and consequently few cases would arise in which they would become the subjects of legal discussion; but so general has the practice of both these branches of Insurance become of late, and so extensively is it increasing, that most persons of property in the kingdom are interested in the proper understanding of the legal nature of these contracts.

Some notion may be formed of the relative importance to the revenue and extent of Insurance

against Fire, from the fact, that in the year 1830 the sum of £768,855 was paid for duties, at the rate of 3*s.* on every £100 insured, and 1*s.* upon the policy; whilst in the same year the sum of £220,007 was paid for duties on Marine Insurance, at about the same average rate of duty per cent.

The attention of the author has been of necessity directed to these subjects, in consequence of his being professionally connected with two offices of very extensive business, and in addition to the experience which that connection afforded him, he has been obligingly favoured by them with much valuable information upon the details and practical operations of business: he trusts, therefore, that the following pages will not be found useless to the legal profession or the public.

As the practice of granting Annuities is common with Companies engaged in the department of Life Insurance, the author thought that a few Chapters affording a concise view of the law upon that subject, embracing the latest decisions and statutes, would tend to render the work more complete; and with the same object he has added a few practical remarks on the application of Life Insurance to the various purposes of Provisions and Endowments for Families, Indemnities in cases of Estates determinable on Lives, and Securities for Debts or Annuities.

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OF THE NATURE OF THE CONTRACT.

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1. This contract is in the nature of an *indemnity* given by the insurers against such loss or damage by fire as may happen to the insured in respect of the houses, buildings, stock, merchandize, or other articles covered by the policy.

The nature of a policy of insurance against fire.

The insurers, after reciting the receipt of the premium, usually *covenant* and *agree*, or *undertake*, that from the day named in the policy unto and inclusive of another day named in the policy, and so long as the insured shall pay or cause to be paid the premium agreed upon, and the insurers shall accept the same, the stock and funds of the (Company) shall be liable to make good any such loss or damage as shall happen by fire, (except loss or damage by fire happening by any invasion, foreign enemy, civil commotion, or riot, or any military or usurped power,) to the property specified.

Several of the exceptions in policies have at different times been the subject of litigation, as to their extent and meaning, which will be considered in their proper places.

The parties insured should have a clear right of action against the parties subscribing or executing the policy.

2. It is very important to the insured that they should have a *clear right of action* against the parties subscribing or executing the policy, to the extent of the funds of the society; that right should not be confined to a mere *order* for payment to be made by the subscribing directors upon the general body of the directors or the company,(*a*) for an action in such a case will not be maintainable against the parties *executing*, or the directors generally.

Upon a case sent by the direction of the Vice-Chancellor for the opinion of the Judges of the Court of King's Bench,(*b*) the question was, whether an action would lie under the following circumstances:—On the 20th of May, 1811, the plaintiffs insured a certain house and premises in which they were interested in the Hand in Hand Fire Insurance Office. The policy was made and duly executed by T. F., N. W., and J. M., as three of the trustees and directors of the office, whereby, in consideration of the sum of 4*l.* 10*s.* the premises valued at 1800*l.* were insured for the term of one year from the date thereof. The policy, after reciting that the plaintiffs had paid into the treasury of the amicable contribution or society, commonly called the Hand in Hand Contributionship or Society, for the insuring of houses and goods from loss or damage by fire, the sum above mentioned, for the purpose above mentioned, proceeded to declare as follows: " now we the trustees and directors of the said society whose names are hereunto subscribed, *do order, direct, and appoint* the directors for the time being of the said society to raise and pay by and out of the monies, securities, and effects of the said contributionship, pursuant and according to certain deeds and

Where a policy by deed declared that the directors executing did order, direct, and appoint the directors for the time being to raise and pay out of the monies, &c. and further referred to certain agreements and conditions of the policy, but there was no express covenant or agreement on the part of such directors: it was held, that an action for the amount of the

(*a*) When the Protector Fire Office was instituted the policy was laid before one of the most eminent common lawyers, and one equally eminent as a conveyancer, for the purpose of giving the public the best security upon this subject.

(*b*) Alchorne v. Saville and others, 6 Moore's Rep. 202, n.

settlements," &c. The instrument, after declaring that the order thus mentioned should comprehend either a total or partial loss by fire, proceeded as follows:—" provided and it is hereby declared and agreed, that when any assignment shall be made of this policy, such assignment shall be entered in the office book within ninety days from the date thereof, &c. and also, that if at the expiration of one year from the date thereof, the said plaintiffs shall again pay the sum of 4*l.* 10*s.* then all the conditions and *agreements* of this policy shall remain in full force for the further term of one year, and so shall be continued from year to year as often as the said sum of 4*l.* 10*s.* shall be paid by the plaintiffs, and the directors for the time being shall agree thereto by accepting or receiving the same. In witness, &c." The policy was signed by J. F., N. W., and J. M., three of the trustees and directors of the said office, and sealed and delivered duly stamped and attested.

loss would not lie against the directors and trustees not parties to the deed, or against the directors executing.

The plaintiffs having sustained a loss by fire, and the defendants having refused to pay within the time prescribed by the policy, a bill was filed in Chancery against the latter as acting trustees and directors of the office, praying that the Court would decree the payment of the loss which the plaintiffs had sustained, and the above case was sent for the opinion of the Court of King's Bench.

Lord C. J. Abbott.—" I can find nothing in this policy by which the defendants *covenanted* to pay the loss which the plaintiffs have sustained. The deed only imports that the trustees and directors for the time being who execute it, *do hereby order, direct, and appoint* the trustees and directors for the time being to pay the loss, in case it should happen, out of the funds belonging to the society. It does not appear to me that the latter words in the policy can have the effect of making that an agreement, which upon the face of it appears to be only an *order for the payment of money*. It never could be intended that this instrument so prepared should have the effect of making the trustees and directors for the time being personally liable; nothing could be more difficult than for a company of this

description to find acting trustees who would personally pay all the policies which the company might think fit to execute. It therefore appears to me that the only remedy the plaintiffs have is in equity, and they cannot turn round and treat this as a covenant at law. I admit that where a party executes an instrument and thereby says, "I agree to do so and so," he would be liable to an action of covenant, but how could a declaration in covenant be framed in this case, either against the defendants or the parties who have executed the policy? As against the latter, no such declaration could be drawn, because the policy imports nothing but an order upon other persons to pay the loss in case it should happen; and as against the former, supposing the instrument to have the effect of an agreement, the action would not lie, because it does not appear that they have executed it. This policy imports nothing but an *order*, and *not an agreement*, I am therefore of opinion that an action of covenant cannot be maintained." The rest of the Court were of the same opinion.

This case of Alchorne v. Saville was cited as an authority in the case of Andrewes v. Ellison and others. (*a*) This was an action of covenant on a policy of insurance, executed by the defendants under seal, to indemnify the plaintiffs against a loss by fire. The declaration stated, that the defendants, on the 9th of December, 1819, as three of the directors of the National Union Fire Association, made a certain deed-poll, commonly called a policy of assurance, whereby, after reciting that the defendants, as such directors, had admitted the plaintiff to be a member upon the terms, covenants, and conditions prescribed by the deed of settlement of the said association; and that the plaintiff had consented to become a member accordingly, and had subscribed the sum of 6*s*. being the consideration-money for one year's insurance from the 25th of December, 1819, and that so long as he should continue to pay the same sum annually on that day, he should be entitled to a remuneration out of the society's funds in case of loss by fire

But the words "stipulated and declared," have been held to give an action of covenant against directors executing the policy.

(*a*) 6 Moore, 199.

to all or any of the property thereinafter mentioned, not exceeding for each item respectively the sum set against the same, viz. 200*l.* on his household furniture, &c. in his then brick built dwellinghouse; it was *declared*, that in case of loss by fire happening to any of the above-mentioned property while such subscription should be regularly deposited, the society was to pay according to the deed of settlement to the plaintiff all such loss and damage, not exceeding the sum set against each article respectively, as he might sustain thereto by fire; and it was further *stipulated* and thereby *declared*, that neither of them the said directors who subscribed the said deed-poll or policy of assurance, nor the plaintiff, as the holder of the policy, should, as members of the said society, be subject or liable to any demand for any loss or losses, except under the articles establishing the said society as was provided by the same. The declaration then set out certain articles and conditions referred to in the policy, and subject to which it was effected, (*a*) and concluded by the usual averments. Several special pleas were pleaded, and on these pleas issues were joined. The cause came on for trial before Lord Chief Justice Dallas, when the jury found a general verdict for the plaintiff.

Serjeant Pell afterwards obtained a rule nisi that the judgment might be arrested, on the ground that there was

(*a*) By the eighth of which it was provided, that whenever losses should happen, the parties were to give immediate notice thereof to the secretary, or to the nearest agent, that a view might be taken and the damage estimated, and also deliver under their hands the amount and particulars of their claim on the office, and make out the same by the oaths or affirmations of themselves, or by their domestics or servants, books or vouchers; and procure certificates of the ministers, churchwardens, neighbours, or inhabitants, not interested in such loss, if they were required by the directors so to do. The loss or damage sustained to be made good within ninety days after the same happened, or as soon as the amount could be properly ascertained, either by the payment of the sum insured, or by repairing or rebuilding the premises destroyed or damaged, as far as the sum insured would allow, at the option of the directors. By the ninth article it was *stipulated* that the office would not make good any losses by fire occasioned by foreign enemies, civil commotions, or any military or usurped power, or in consequence of explosion of gunpowder or steam.

nothing *on the face of the policy*, or *in the declaration*, to *import any covenant or agreement in law* to support the action, or render the defendant liable to pay the loss in question. He submitted that the plaintiff's only remedy was in equity, and relied on the case of Alchorne v. Saville, (*a*) as bearing a near resemblance to the present, and in which the Court of King's Bench had decided, that an action of covenant could not be maintained, although the words in the proviso there were "declared and agreed," while the words "stipulated and declared" only were adopted here.

Serjeants Vaughan and Hullock showed cause contrà.

Lord Chief Justice Dallas.—"It has been admitted in the course of the argument that no precise or technical words are necessary to create a covenant, but that whether it be so or not depends upon the intention of the parties. This, therefore, narrows the consideration of the present question to the words contained in the policy on which this action is brought; and although there are no precise words in that instrument, still the defendants have *stipulated* and *declared* that neither of them as directors of the association, or as members of the society, should be subject or liable to any demand for loss or losses, except under the articles for establishing the society, and as is provided by the same. In the reasonable construction of this stipulation it amounts to an express agreement, and the instrument may be considered as a covenant to entitle the insurer, in case of loss by fire, to receive a remuneration out of the funds of the society to the extent of such funds, as the defendants have expressly declared that the society would be responsible, but they have limited such responsibility to the sufficiency of their funds. The plain and obvious meaning therefore appears to me to be, that the association are liable to the extent of their funds; and consequently that the defendants, as three of the directors, have entered into an express agreement to be responsible to the plaintiff as far as the

(*a*) Ubi supra.

funds of the society will allow. The case is altogether distinguishable from the case of Alchorne v. Saville, as here the defendants *have executed the deed*, but there they were not parties to it, they only ordered the directors of the society for the time being to do particular things, viz. to raise and pay out of the monies and securities of the contributionship according to certain deeds and settlements, and the Court of King's Bench decided that they were not personally liable, as it was not their deed, and as they merely appointed other persons to pay a loss, in case it should happen, out of the funds belonging to the society. Here, however, the defendants covenanted to pay, if the funds of the society should be adequate. That, therefore, puts an end to the question. Besides, the breach assigned by the plaintiff in his declaration is sufficient, for he states that, although the funds of the association were adequate to pay, yet that the defendants refused to do so. As this case, therefore, is so mainly distinguishable from that of Alchorne v. Saville, I have no doubt that the plaintiff is entitled to recover, and more particularly so, as the policy in question was signed by the defendants, who agreed or covenanted to be themselves personally liable as far as the funds of the society would extend; and the Court will not arrest judgment after trial, unless it be obvious and clear that there is some material ground on which they are enabled to do so, all the pleas on the record having been negatived by the jury. I therefore think there is no substantial ground whatever for arresting this judgment."

Mr. Justice Parke was of the same opinion. "This case differs from that of Alchorne v. Saville, which was a special case, sent by the Vice-Chancellor for the opinion of the Court of King's Bench, in which it was expressly stated that the defendants merely ordered the directors for the time being to pay, and they did not sign the policy. Here, however, the defendants' seals and signatures are attached to the instrument, in which it is recited that they were three of the directors of the association, and agreed that as long as the plaintiff should continue to pay an annual sum for

insurance of his premises from fire from year to year, he should be entitled to a remuneration out of the society's funds. That was an express undertaking that he should be so remunerated. Besides, they admitted the plaintiff a member on the terms, covenants and conditions prescribed by the deed of settlement of the association; and by the eighth clause of the articles which are set out in the declaration, the loss sustained was to be made good within ninety days after the same happened, either by repaying the sum insured, or by repairing or rebuilding the premises destroyed. The defendants signed the policy which referred to that article or condition. It is true they are not themselves personally liable, but the plaintiff was clearly entitled to recover from the funds of the society, if they were sufficient to defray the amount of his loss. The plaintiff has averred that they were, and that, therefore, is all that he was required to do; and I fully concur with my Lord Chief Justice that the Court will not arrest a judgment unless it be perfectly clear that the plaintiff is not entitled to retain it, for it is a general rule that nothing is to be presumed after verdict but what is expressly stated in the declaration, or necessarily implied from the facts which are stated."

Mr. Justice Burrough.—"I am satisfied that this judgment ought not to be arrested. The directors of the society held themselves out to the world as being responsible persons. If they were not so, no person would insure property with them. The defendants admitted the plaintiff to insure, and agreed by such admission that he should be entitled to a remuneration out of the society's funds, as no precise words are necessary to constitute a covenant. The words "shall be entitled" are sufficient to imply that the plaintiff should be remunerated out of the funds of the society, provided they were sufficient for that purpose; they therefore had a right to look to the defendants in the first instance. Unless they were liable, no society of this description would be obliged to pay in case of loss. Even if the words contained in the policy were more equivocal than they are, still, as the defendants have executed the instrument, I think they

are liable, and that it was unnecessary for the plaintiff to have set out more than he has done in the declaration."

Mr. Justice Richardson.—"This was an action of covenant brought against the defendants as three of the directors of the National Union Fire Association, and the terms of the policy have been set out by the plaintiff in his declaration; by which it appears, that, in case of loss by fire, he was entitled to receive a remuneration for such loss out of the funds of the society; and he has averred that they have sufficient funds to cover the damage he has sustained. The defendants should either have demurred, or pleaded that the funds were insufficient; but they have put a number of other pleas upon the record, imputing fraud to the plaintiff, which the jury negatived, and set him right by their verdict; and the defendants now seek to turn him round on an objection to the declaration; but I think it is not well founded, or at all events it is insufficient for the purpose of arresting the judgment. It appears on the face of the policy that the defendants were three of the directors; that as such they admitted the plaintiff to be a member; and it then states that he should be entitled to a remuneration out of the society's funds in case he sustained a loss by fire. This policy was executed under the hands and seals of the defendants, and the plaintiff has declared that he has sustained a loss by fire, and that the society had funds, and were bound to pay according to the terms of the articles under which it was established. The policy also contains a declaration that the society were to pay according to the deed of settlement, and that the defendants, as directors, should not be subject to any demand for losses, except under the articles establishing the society. Under this stipulation the plaintiff was entitled to set out such articles in his declaration, and which are now properly brought before the Court. The eighth article held out that the society were liable to satisfy such loss, in case the insurer did all that was requisite of him to be done within that period. This case is wholly distinguishable from that of Alchorne v. Saville, as here the substance of the policy is

set out, and the deed of settlement referred to. In that case there were no sufficient words to raise a covenant by the defendants, as they merely appointed the directors for the time being to pay out of the monies, securities, and effects of the contributionship pursuant and according to certain deeds and settlements; and the Court thought that the policy imported an order for the payment of the money, and not an agreement, and that even if it could be considered as such, and was declared upon as against the defendants, the plaintiff must have been nonsuited on the plea of non est factum, because it was not their deed. My brother Pell, however, has contended that the words "declared and agreed" were there introduced in the proviso, whilst here the words "stipulated and declared" only were used; but the former words were introduced in that case for a very different purpose, for they could have no effect as to the order and direction to the directors for the time being to pay out of the funds of the society. I therefore concur with the Court in thinking that the judgment in this case ought not to be arrested. Rule discharged."

Some cautious pleaders, in framing declarations on behalf of the insured to recover upon a loss, aver that the share of the capital in the company belonging to the subscribing directors, amounts to some large sum of money more than sufficient to cover the sum insured for, with the object of affecting the subscribing directors personally, in case, by means of any defect in the internal machinery of the company, or any other cause, the joint stock funds of the company should not be made available to the purpose.

The policy must state the interest of the insured, and on whose account the policy is made.

3. By stat. 14 Geo. 3, c. 148, s. 2, it is enacted, that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other *event* or *events*, without inserting in such policy or policies the person or person's name or names interested therein, or for whose use, benefit, or on whose account, such policy is so made or underwrote.

4. The offices in general, in order to render the operative part of the contract more concise, introduce the scale of premiums applicable to the different risks by indorsements upon the policy, referring to them, so as to make them part of the contract; these indorsements usually consist of a table of premiums to be paid—1. In respect of such as are called "common insurances," or those for which the lowest rate of premium is to be paid, as buildings, which, from their construction, materials, or use, are exposed to the least degree of hazard. 2. In respect of such as are called "hazardous insurances," as buildings, which, from their materials or construction, are more susceptible of ignition, but in which no hazardous trades are carried on, or hazardous goods deposited; *buildings* not of a hazardous nature, as those of the *first* class, but in which hazardous trades are carried on, or some circumstances of hazard are attached, as the presence of stoves; the *stock* and *goods* of various specified traders, whose occupation exposes the goods to hazard, various specified articles of trade of a hazardous nature deposited in buildings not hazardous.

Indorsements on the policy.

Common insurance.

Hazardous insurance.

For insuring these a higher rate of premium is to be paid. 3. In respect of such as are called "double hazardous insurances," such as buildings, which from their construction or materials are of a hazardous nature, in which hazardous goods are deposited, or hazardous trades are carried on, thus exposing the insurers to an increased liability of ignition, both from the nature of the buildings and the goods contained in them, or trades carried on, for insuring these a still higher premium is to be paid. There are also cases of *extraordinary risk*, as those of sugar refineries and manufactories, not included in the usual tables of premiums. These are usually made the subjects of special agreements, all the circumstances of the case being taken into consideration. Money, and securities for money, are not in general insured upon any terms.

Double hazardous insurance.

Extraordinary risks.

After these tables of premiums, there usually follow the

The conditions.

conditions or proposals, which the insured must comply with at his peril, as they form part of the policy and are conditions precedent, upon a due compliance with which must depend his right to an indemnity in case of loss.

The most important conditions are usually to the following effect:—the insured, upon effecting a policy, must give an accurate description of the construction and nature of the premises and goods to be insured, for upon that statement the insurers fix the amount of the premium to be paid, or exercise their discretion by rejecting the insurance altogether. This is a point of the utmost importance for a party about to insure to attend to, for even, without any *special condition*, a *misrepresentation*, whereby a less premium is paid than would be payable if a true statement had been made, even without a fraudulent intent, would, upon the common principles of insurance, be sufficient to render void the policy. (*a*) Every insurance attended with particular circumstances of risk, arising from the situation or construction of the premises, or the nature of the trade carried on, or the goods therein, should be specially mentioned in the order given for the policy, so that the risk may be fairly understood. If not so expressed, or if buildings and goods be described in the policy otherwise than they really are, or if after an insurance shall have been effected, the risk shall be increased by the erection or alteration of any stove, the carrying on any hazardous trade, operation, or process, the deposit of any hazardous goods, or in consequence of the formation of any hazardous communication, the insured will, by the conditions of most offices, lose the benefit of his policy. (*b*)

Description of the property to be insured.

A statement of loss to be made to the office.

All persons who have sustained any loss or damage are, in general, to give immediate notice to the office and deliver a statement of their loss, supported by the evidence required by the rules of the respective offices; according to the practice of some, the *certificate* of the clergyman of

(*a*) Roberts v. Fonnereau, Park, 285. Fitzherbert v. Mather, 1 T. R. 12.
(*b*) See Protector Policy, Appendix, cond. 2.

the parish, the churchwardens, and some other respectable inhabitant, is made one of the modes of evidence of the amount of the loss. The production of this certificate has been held to be a *condition precedent*, (*a*) in the absence of a compliance with which the insured cannot recover. As there is no mode of compelling the clergyman, churchwardens, or inhabitants to certify, a hardship is sometimes incurred by the insured; a clergyman may sometimes refuse to certify, not from the intention of throwing an imputation upon the character of the insured, but because as the minister of a large parish he has little opportunity of becoming acquainted with the character of the insured, the particular circumstances of the fire, or form any estimate of the loss: this mode of proof has therefore been abandoned by many of the offices. If a landlord insuring wishes to secure the payment of *rent* from his tenant, in case the premises occupied by him should be burnt, it ought to be specified in his policy; for a landlord, upon a lease containing a covenant for payment of rent, as is usually the case, does not lose his right in consequence of the premises being burnt, and therefore needs no indemnity; besides, rent is not a loss or damage by fire, it may be hazarded or even lost in consequence of a fire, but it never yet seems to have been distinctly held that a policy can cover a *consequential* loss or damage; for if so, an office might be called upon to compensate for loss of *business* or *misfortunes* in trade, which might eventually take place in consequence of a fire, and such an indemnity for losses is certainly not contemplated by the insurers.

Evidence in support of claims for loss.

Insurance of rent to be specified.

In general, persons insuring are to give notice of any other insurance made elsewhere upon the same property, in which case the insurers are only to be liable to the payment of a rateable proportion of any loss or damage; even without a special condition of the policy, a party insured effecting a *double* insurance can only recover the real amount of his loss, and if he sues one insurer for the

Notice of any other insurance to be given.

(*a*) See this subject considered, post, Proof of Loss.

whole, that insurer may compel the others to contribute their proportional parts. (*a*)

Fraud or false-swearing in the claim made will vitiate the contract.

In the policies of most offices there is a condition, that if there appear any *fraud* in the claim made for the loss, or *false swearing* or *affirming* in support thereof, the claimant shall forfeit all benefit under the policy. Now, *fraud* is in law *allegatio falsi* or *suppressio veri*, and therefore any wilful mistatement of the extent or amount of the loss, in the claim preferred, with the view to injure the office, may subject the insured to lose his indemnity even in respect of that loss or damage which he has actually sustained. In a late case of Wood v. Masterman and others, (*b*) in which a claim was resisted, and the condition vacating the policy in case of fraud was insisted upon by the insurers, Lord Tenterden told the jury, that if they thought the plaintiff had overrated the amount or value of his loss from mere mistake or misapprehension, they would find only for such loss or damage as he had actually incurred; but if, on the other hand, they thought he had done so with a fraudulent intent, then they should find a verdict for the defendants. These are rules which the offices have been obliged to adopt for their own security. In the multiplicity of their concerns, it would be absolutely impossible for them to ascertain the truth or falsehood of representations made to them at the time the insurance is effected; and as the knowledge of all the facts necessarily rests with the insured, he is bound to furnish a true statement, upon which he is to stand or fall. The offices, however, are seldom in the habit of availing themselves of the clause relating to fraud, unless they have good reason to suppose that a *gross* imposition is attempted to be practised upon them. When a person insured demands twice as much in respect of his loss or damage as he can give any probable evidence of or a jury will give him, (and

When a person recovers only half the sum claimed, it would appear to be evidence of fraud.

(*a*) Newby v. Read, 1 Bla. 416. Rogers v. Davis, Beawes, Lex. Merc. 242. Davis v. Geldart, Beawes, ubi supra.

(*b*) K. B. Feb. 11, 1822, MS.

juries are in general very liberal to the public as against the offices,) it is a fact which strongly indicates fraud; and in a recent case of Levi v. Baillie and others, (certain directors of the Palladium,)(*a*) it appeared that the policy of insurance upon which the action was brought contained the usual condition, requiring the insured suffering a loss to deliver in to the office as full an account thereof as the nature of the case would admit of, accompanied by the usual evidence; and it also contained the other usual condition, that "if there should be any *fraud in the claim made*, or false swearing or affirming in support thereof, the claimant shall *forfeit all benefit* under such policy. The plaintiff, an upholsterer, carried on business in a small house in the New-cut, in St. George's Fields, and the insurance to the amount of 1,000*l.* was effected on his stock in trade, the 22d of November, 1827. The premises were burnt down on the night of the 14th of February, 1830. The plaintiff made affidavit, that, in consequence of the fire, he had sustained a loss of stock to the amount of 1,085*l.*, viz. 85*l.* for goods which were injured in the removal, and 1,000*l* for goods which had been abstracted by the crowd assembled on the occasion, and had never been recovered. The goods so lost were alleged to consist of four-post bedsteads, mahogany tables of various sizes, couches, chairs, stools, chimney glasses, pier glasses, carpets, and the like.

The defendants contended that this claim was *fraudulent*, and called witnesses to show that it was impossible for goods so numerous and bulky to have been carried off undiscovered. These witnesses stated, that policemen were on the spot as soon as the fire broke out; that a cordon was established round the premises almost immediately; that the fire was over in about two hours, and that no article of size could be carried away. The plaintiff's witnesses denied that the blockade had been so effectual; and the Chief Justice left it to the jury to say whether the plaintiff had made a *fraudulent* demand or not. The jury

(*a*) 7 Bingh. 349.

having found a verdict for the plaintiff with 500*l.* damages, Taddy, Serjeant, obtained a rule *nisi* for a new trial, on the ground that the finding of 500*l.* damages, instead of the whole amount sworn to by the plaintiff, amounted, in effect, to a verdict for the defendants, under the condition which avoided the policy if there were any fraud or false swearing in the plaintiff's claim; a claim of 1,085*l.*, where a party had lost 500*l.*, could not be otherwise than fraudulent. He also objected to the verdict as contrary to evidence.

Wilde and Andrews, Serjeants, who showed cause, contended that the finding of the jury was not necessarily a proof that there had been any fraud in the plaintiff's claim, he might, by mistake, have estimated the goods lost at more than their value; as to the probability of the loss, the evidence was merely conflicting.

The Court having taken time to consult, made the rule absolute on payment of costs.

A remark may be made upon another singular feature in this case, that the claim in general was made, not in respect of goods *lost* or *damaged by fire*, but in respect of goods *abstracted* in consequence of the opportunity which the fire afforded. It does not appear whether the learned judge directed the jury upon this point, though it might be supposed that a jury would not have found damages to such an extent without a direction to that effect.

Of the average clause.

In consequence of the numerous fires which have recently taken place in the agricultural and manufacturing districts by the acts of incendiaries, the offices in general have been under the necessity of adopting the *average clause* in their policies upon farming stock, by which, where a person insures property collectively of larger value than the amount insured, he shall only recover in the proportion which the whole value bears to the part insured. (*a*) For example, if having property worth 10,000*l.* he insures it only for 1000*l.*, in case of a fire producing loss or damage to the amount of 1,000*l.*, he will recover only 100*l.*

(*a*) See Appendix.

Payment of expences incurred in removing goods in case of fire.

As an encouragement to the insured to use active diligence in the preservation of property after a fire has broken out, it frequently forms a part of the proposals that the office will repay all real and actual expences incurred in the removal of goods in case of fire. It is indeed difficult to conceive any conduct more nearly approaching to fraud, if not partaking of it, than for a party insured to abstain himself, or prevent others, from using every possible means to extinguish the fire or save the property from destruction.

Duties upon the policy and amount insured.

5. The legislature has imposed certain *duties* both *upon the policy* and *the amount* insured; as the premiums upon the latter have of late years been considerably reduced, and the duties still continue the same as they were before the reduction, the duties bear an unequal proportion to the premiums, and operate as a check upon the more general extension of the salutary practice of insurance. By stat. 55 Geo. 3, c. 184, a duty of 1*s.* is imposed upon every policy; and also the yearly sum of 3*s.* for every 100*l.* insured for a year, and at and after that rate for every fractional part of a year. (*a*) Thus, upon the *common insurance* of 1*s.* 6*d.*, a duty of 200 per cent. is imposed.

Insurances on public hospitals, and on property in any foreign kingdom or state in amity with his majesty, are exempted from duty.

By the same act, a higher rate of duty is imposed in respect to insurances (made by persons not licensed pursuant to stat. 22 Geo. 3, c. 48,) upon property in the colonies, namely, on the policy 2*s.* 6*d.*, and on the sum insured 5*s.* per cent.

Plurality of risks not to be included in the same policy without an average clause.

And by a more recent statute of 9 Geo. 4, c. 13, it is enacted, that in every case where any insurance from loss or damage by fire shall be made or renewed or continued upon *two* or *more* detached buildings, or upon *two* or *more* buildings so separated from each other as to occasion a *plurality* of risks; or upon any goods, wares, or merchan-

(*a*) See Schedule of the Act, p. 1.

dize, or other moveable property contained in *two* or *more* such buildings as above described, or lying or being in *two* or *more* places so separated from each other as to occasion a plurality of risks, (except the implements and stock upon any one farm), then, and in any of the cases aforesaid, every such separate building shall be separately valued, and a distinct and separate sum shall be insured upon the goods, wares, merchandize, or other moveable property contained in every such separate building, or lying or being in every such separate place; and it shall not be lawful to insure one gross sum upon *two* or *more* of such separate subjects or parcels of risk as aforesaid taken collectively. S. 1.

Farming stock excepted from the provisions of the statute.

If any policy shall be granted, or renewed, or continued, whereby any insurance from loss or damage by fire shall be made of or upon *two* or *more* such separate subjects or parcels of risk as aforesaid collectively in one sum, contrary to the true intent and meaning of this act, such policy shall be void and of none effect; and the person or persons, &c. by whom any such policy of insurance shall be granted, &c. shall forfeit the sum of 100*l.* S. 2. The act, however, is not to prevent the insuring collectively, in one sum, any number of distinct buildings, or lying in any number of separate and distinct places, provided there be in such policy the *average clause.*(*a*)

Whether the memorandum requires a stamp.

In the schedule to the stat. 55 Geo. 3, c. 184, tit. Agreement, an exemption from preceding and all other stamp duties is contained in respect of the *label, slip,* or *memorandum,* containing the heads of insurance to be made by the corporation of the Royal Exchange Assurance and London Assurance, or by the corporation of the Royal Exchange Assurance of houses and goods from fire, and London Assurance of houses and goods from fire.

It would appear, therefore, that these *memorandums* are to be considered as *agreements,* and if so, it would appear that they could not be given in evidence (except by the two corporations abovementioned) unless stamped as such,

(*a*) See Appendix.

where the premium exceeds 20*l.*; for by stat. 55 Geo. 3, c. 184, sched. tit. Agreement, an agreement, or any minute or memorandum of an agreement, made in England under hand only, or made in Scotland without any clause of registration, (and not otherwise charged in this schedule nor expressly exempted from all stamp duties,) where the matter thereof shall be of the value of 20*l.* or upwards, whether the same shall be only evidence of a contract or obligatory upon the parties, from its being a written instrument, &c. requires a 1*l.* stamp. As it would be difficult to assess the value of a contract of insurance by any other standard than the amount of the premium paid, it would appear that the necessity of a stamp upon the memorandum depends upon the circumstance whether the premiums (without duty) amount to 20*l.* or not. It would be too much to say that the sum insured is the value of the contract, inasmuch as insurance is only an indemnity, rendering the insurers liable only upon the happening of a contingency. It is sufficient that an agreement have the proper stamp at the time when it is given in evidence.

By the stat. 14 Geo. 3, c. 78 s. 83, entitled an "Act for the further and better Regulating of Buildings and Party-Walls, &c. within the Weekly Bills of Mortality," &c. it is enacted, that "it may be lawful for the directors and governors of the several insurance offices, and they are hereby authorized and required, upon the request of any person, &c. interested in or entitled unto any house or houses or other buildings, which may hereafter be burnt down, demolished, or damaged by fire, or upon any grounds of suspicion that the owner, &c. occupier, &c. or any other person, &c. who shall have insured such house or other building, have been guilty of fraud, or of wilfully setting their house or other building on fire, to cause the insurance money to be laid out and expended, as far as the same will go, toward rebuilding, reinstating, or repairing such house or houses or other buildings so burnt down, &c. unless the party, &c. claiming such insurance money shall, within sixty days next after his, &c. claim is adjusted, give sufficient

Right of insurance offices under the party wall act to rebuild or reinstate buildings burnt down.

security to the governors or directors of the insurance office, where such house or houses or other buildings are insured, that the same insurance money shall be in that time settled and disposed of to and amongst all the contending parties, to the satisfaction and approbation of such governors and directors."

Exemption from duty on receipts so far as regards the duty only.

By the statute 55 Geo. 3, c. 184, sched. tit. Receipt, an exemption is given in respect of a receipt given solely for the *duty* on insurance against fire; and receipts given for the premium and duty on such insurances are to be liable only to the receipt duty in respect of the *premium*. If the premiums therefore do not amount to 40*s*., no duty will be payable on the receipt.

CHAPTER II.

OF THE INTEREST OF THE INSURED.

THE party insuring must have an interest in the property insured to entitle him to recover. To permit the existence of wager policies upon such a subject as insurance against fire would be a pernicious principle, as it would necessarily lead to the commission of those nefarious practices which it is one of the objects of legitimate insurance against fire to prevent. Thus, even before the passing of the stat. 14 Geo. 3, Lord Chancellor King, in the case of Lynch v. Dalzell,(*a*) said, in a case where a policy upon a house and goods had been assigned after the fire happened, "the party insured must have a property at the time of the loss or he can sustain no loss, and consequently can be entitled to no satisfaction." Again, in a case somewhat similar, and which will hereafter be more particularly noticed,(*b*) Lord Chancellor Hardwicke said, "I am of opinion that it is necessary that the party insured should have *an interest or property at the time of insuring and at the time the fire happens.* It has been said for the plaintiffs," observed his lordship, "that it is in nature of a wager laid by the insurance company, and that it does not signify to whom they pay if lost. Now these insurances from fire have been introduced in later times, and therefore differ from insurance of ships, because there *interest or no interest* is almost constantly inserted, and if not inserted you cannot recover unless you prove a property." His lordship afterwards proceeds thus, "to whom or for what loss are they (the offices) to make satisfaction? Why, to the person insured and for the loss he may have sustained, for it cannot pro-

The insured should have an interest at the time of insuring and at the time the fire happens.

(*a*) 4 Bro. P. C. 431, ed. Toml.

(*b*) The Sadlers' Comp. v. Badcock and others, 2 Atk. 554.

perly be called insuring the thing, for there is no possibility of doing it, and therefore must mean insuring the person from damage."

The stat. 14 Geo. 3, c. 48, although by its title it appears to relate only to insurance upon lives, embraces in its preamble and enactments all kinds of insurance except marine insurances. It recites, "that the making insurances on lives or *other events*, wherein the insured shall have no interest, hath introduced a mischievous kind of gaming;" and then enacts, "that no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person for whose use and benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every insurance made contrary to the true intent and meaning hereof shall be null and void." S. 1. "And in all cases, where the insured hath interest in such life or lives, *event or events, no greater sum* shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured on such life or lives, or other *event or events*." S. 3.

Interest in the insured required by statute.

It appears, however, that the insured need not have an absolute and unqualified or immediate interest in the property insured. Thus a trustee, a mortgagee, a reversioner, a factor or agent of goods to be sold by commission, and probably a pawnee, depository, or common carrier, may legally insure their respective interests, subject to the rules of the different offices, by most of which the nature of the property insured is to be specified; (*a*) and it may be observed in general, that although the stat. 14 Geo. 3, c. 48, has a tendency to throw considerable difficulties in the way of recovering upon a loss both on fire and life policies, by putting the claimant to the proof of his interest, in order to entitle him to recover, the offices in general, from a sense of liberality and the good faith due to the public, seldom avail themselves of this objection when the

(*a*) 2 Marsh. 789; and see Thorowgood v. Marsh, 1 Gow, 108.

claim is even tolerably fair and honest. In fact, such would be the difficulty of ascertaining the precise quantum of interest in many cases, in order to comply with the third section of the act, that this clause would, if insisted on, materially affect the whole system of fire and life insurance, by making the sum to be paid upon the event happening a constant subject of doubt and litigation.

It is made a condition with most offices, that persons insuring property should give notice of any other insurance made elsewhere on the same property on their behalf, and cause a minute or memorandum of such other insurance to be endorsed on their policies; and in this case the company is only to be liable to the payment of a rateable proportion of any loss or damage which may be sustained, and unless such notice be given, the insured are not to be entitled to any benefit under the policy. (*a*)

Doctrine of return of premium not applicable to case of insurance from fire.

According to the general principles of insurance, whenever the risk to be run is *entire,* there is no return of premium, though the contract should cease and determine the next day after its commencement. This rule applies to insurances against fire, which generally are made for one entire and connected portion of time, which cannot be severed; and therefore if the property insured should be destroyed by fire, arising from the act of a *foreign enemy,* the very day after the commencement of the policy, though the underwriters would be discharged, yet there can be no apportionment or return of premium. (*b*)

Even if the insured have no interest, yet it would appear that he cannot recover back the premium after taking the *chance* of a loss, and of obtaining from the *generosity* of the insurers the sum insured. (*c*)

(*a*) See cond. 6 of Protector policy; see also the average clause, Appendix.
(*b*) Parke, c. 23; 2 Marsh. 652.
(*c*) Lowry v. Bourdieu, Dougl. 468.

CHAPTER III.

THE NATURE AND EXTENT OF THE RISK FOR WHICH THE INSURERS UNDERTAKE.

1. *Damage by* Heat *in the process of manufacture without* Ignition.
2. *Insurance of Specific Articles to be construed by the general scope of the Policy.*
3. *Breach of Warranty and the nature of Warranties.*
4. *Of Misrepresentation of material Facts.*
5. *Concealment of material Facts.*
6. *Construction of the words "Usurped Power."*
7. *Construction of the words "Civil Commotion."*
8. *Right of an Office to stand in the place of the insured as against the Hundred.*
9. *Commencement and duration of the Contract.*
10. *Effect of Notice by an Office to determine a Contract, except upon payment of a higher Premium, and of the* 15 *days allowed for payment of Premiums.*
11. *A nominal Misdescription and the necessary introduction of Fire into a Building, covered by the common insurance.*

THE insurers, in consideration of the premium paid, usually undertake to pay or make good to the insured, his executors, administrators, and assigns, all such loss or damage as shall happen by fire, (except loss or damage by fire happening by any *invasion, foreign enemy, civil commotion* or *riot,* or any *military* or *usurped power* whatever,) to the property specified, to the extent of the sum for which it is insured, but they sometimes also give notice, by the indorsements of the policy, that they will not be answerable

for loss or damage on stock of any kind *occasioned* by the *misapplication of fire heat under process of manufacture*, or for loss or damage to hay or corn, or stock of any kind, *occasioned* by its own *natural heating*. It is obvious, that to indemnify the insured against ignition under either of these circumstances, would be to open a door to negligence and fraud, if not directly to encourage it. On the other hand, to remove any doubt in the minds of the insured, though little could exist upon the terms of most policies, it is sometimes expressly stated that losses occasioned by fire from lightning will be made good.

1. A case has occurred which shows, that, in order to recover upon a policy against loss or damage *by fire*, it is not sufficient to show that the property has been damaged by the *heat* of fires usually employed in the manufacture, and increased by the negligence of the insured, or his servants, beyond its usual intensity.

Insurance against fire does not cover damage by *heat* in the process of a manufacture.

An action was brought (*a*) on a policy of insurance effected "against all the damage which the plaintiffs should suffer by fire" on their "stock and utensils in their regular built sugar-house," and plaintiffs averred that "their stock and utensils were very much damaged by fire in the sugar-house." The defendants pleaded that the stock and utensils were, through the negligence and improper conduct of the plaintiffs and their servants in managing the fires usually employed in the sugar-house, damaged by the smoke arising from such fires, and not from any other cause, and traversed the damage by fire. It appeared that the building insured contained eight stories, and in each story sugar, in a certain state of preparation, was deposited for the purpose of being refined; in order for refining, a certain degree of heat was necessary, and a chimney, running up through the whole building, formed almost one side of one of the stories, and by means of this chimney heat was communicated to each of the stories. At the top of the chimney, above the eight stories, was a regulator, which the plaintiffs used

(*a*) Austen v. Drewe, 6 Taunt. 436.

to shut at night, in order to retain in the chimney and building all the heat they could. They shut it one night, and lighted the fires next day, and they soon afterwards found the building full of smoke and sparks; and it was found that the regulator, which always ought to be open when the fire was burning, was continued shut down. There was much smoke, but the only injury done to the sugars proceeded from heat; nothing *was on fire* that ought not to be on fire; the damage was occasioned by the sparks, heat, and smoke taking a wrong direction. Gibbs, C. J. directed the jury, that inasmuch as the damage was occasioned entirely by the increased heat which was produced by keeping the regulator closed, it was not a loss by fire within the meaning of the policy, but was occasioned by the improper management of the regulator. The jury found a verdict for the defendants. Shepherd, Sol. Gen. afterwards moved for a new trial, on the ground that the words of the policy were "damage by fire," not "excess of fire," or "improper fire." If flame caused the mischief, he said, it mattered not whether the fire was properly or improperly lighted, the question was, whether fire occasioned the damage. It could not be necessary that the fire, to produce a loss within the policy, should be only such fire as was communicated to some substance not contained in the proper receptacle of fire. Suppose the intensity of heat necessarily required for any process should be so great that the fire made in a chimney, though confined there, might ignite neighbouring bodies, it might in that case as well be said that it was not a damage by fire. Put the case of a chimney on fire, there is only the usual quantity of heat below, but the mischief is occasioned by an accumulation of soot in the chimney, yet the insurers would be bound to pay any loss thereby occasioned. Gibbs, C. J.—I think it is not necessary to determine any of those extreme questions. In the present case I think no loss was sustained by any of the risks in the policy—the loss was occasioned by the extreme mismanagement by the plaintiffs of their

regulator. I have no reason to alter my opinion. Dallas, J. was of the same opinion, and the rule was refused.

It does not appear whether the proposals of the policy in this case protected the insurers from making good any loss or damage occasioned by the *misapplication of fire heat under process of manufacture.* It probably did not, or it would otherwise have been made a strong point for the defendants. It may be inferred, therefore, from this case, that damage by *heat* alone, without *ignition,* even where there is no express provision, is not covered by the ordinary indemnity against loss or damage by *fire,* and a fortiori, where this provision is introduced, and the *misapplication* of *fire heat* occasions ignition, the insurers will not be liable.

2. The contract is to be construed according to the intention of the parties at the time it is entered into, and whether a specific article is covered by a policy must be inferred from the context and general scope of the policy.

In the case of Watchorn v. Langford, (*a*) which was an action upon a policy of insurance against the Eagle Insurance Company, the plaintiff, a coach plater and cowkeeper, insured his "stock in trade, household furniture, *linen,* wearing apparel, and plate," against fire for one year. A fire happened within the year, and consumed, amongst other things, a large stock of *linen drapery* goods, which he had purchased a short time before on speculation, and which, it was contended, were protected by the policy under the denomination "linen." But Lord Ellenborough was clearly of opinion, that that word in the policy did not include linen drapery, noscitur a sociis, and therefore the *linen* being preceded by the words "household furniture," and succeeded by "wearing apparel," must mean *household linen* or apparel.

The insurance of specific articles to be construed by the general scope of the policy.

3. A *breach of warranty* will avoid the contract. The doctrine of warranties has been a more frequent subject of

Breach of warranty avoids the contract.

(*a*) 3 Campb. 422.

discussion in cases of marine policies, but so far as it is applicable to the subject, the doctrine of warranties is of equal authority in cases of life and fire insurance. A warranty is a stipulation or agreement on the part of the insured, in the nature of a condition precedent, and as applicable to fire policies is usually of an *affirmative* nature, as that the property insured is of the nature described in the policy.

Nature of warranty.

A warranty being in the nature of a condition precedent, it is quite immaterial for what purpose or with what view it is made; but being once inserted in the policy it becomes a binding condition on the insured: and unless he can show that it has been strictly fulfilled, he can derive no benefit from the policy. The meaning of a warranty is to preclude all question whether it has been substantially complied with or not. If it be affirmative, it must be literally true; if promissory, it must be strictly performed.

The breach of warranty, therefore, consists either in the falsehood of an affirmative, or the non-performance of an executory stipulation. In either case the policy is void, and whether the thing warranted be material or not, whether the breach of it proceeded from fraud, negligence, misinformation, mistake of an agent, (unless the agent of the insurers,) or any other cause, the consequence is the same. With respect to the compliance with warranties, there is no latitude nor equity. The only question is whether the thing warranted has taken place, or be true or not. If not, the insurer is not answerable for any loss, even though it did not happen in consequence of the breach of the warranty. (*a*)

An express warranty being in the nature of a condition precedent, it must appear on the face of the policy; therefore instructions in writing for effecting the policy, unless inserted in the instrument itself, do not amount to a war-

(*a*) See Lord Mansfield's observations, Hibbert v. Pigou, 2 Park, 498 ; Marshall on Insurance, 375. Lord Eldon's observations, Newcastle Fire Insurance Company v. Macmorran, 3 Dow, P. C. 255.

ranty,(*a*) but only to a representation, upon which the doctrine differs, as will hereafter be seen.

A warranty must form a part of the policy.

Where a slip of paper describing the state of a ship, the particulars of the voyage, &c. was *wafered* to a policy at the time of subscribing, Lord Mansfield held that this was not a warranty, or to be considered part of the policy, but only a *representation;*(*b*) and where evidence was offered to prove that a written memorandum enclosed in the policy was always *among merchants* considered as a part of the policy, Lord Mansfield held, that whether this was or was not a part of the policy was a question of *law*, and therefore that such evidence could not be received, and that a written paper, by being *folded* up in the policy, did not become a warranty.(*c*)

But it is sufficient that the warranty appear upon the *face* of the policy, although not written in the *body* of it. If it be written in the margin, either in the usual way,(*d*) or transversely,(*e*) it being part of the written contract when signed, it will be a good warranty.

Misrepresentations, if material, will avoid a policy.

4. A *misrepresentation*, if *material*, will avoid a policy. A representation in insurance is in the nature of a collateral contract, either by *writing not inserted* in the policy, or by *parol*, and is a communication of facts and circumstances relative to the insurance made to the underwriters, with the view to enable them to estimate the risk and calculate the premium to be paid.

What representation is material.

A representation is said to be *material*, when it communicates any fact or circumstance what may be reasonably supposd to influence the judgment of the underwriters in undertaking the risk, or calculating the premium; and whatever may be the form of expression used by the insured or his agent in making a representation, if it have the effect of imposing upon or misleading

(*a*) Pawson v. Barnevelt, Dougl. 12, n. Bond v. Nutt, Cowp. 606, 607.
(*b*) Bize v. Fletcher, Dougl. 12, n.
(*c*) Pawson v. Barnevelt, Dougl. 12. 1 Marsh. 356.
(*d*) Bean v. Stupart, Dougl. 11.
(*e*) Per Lord Mansfield, in Kenyon v. Berthon, Dougl. 12, n.

the underwriter, it will be *material*, and fatal to the contract.

There is this material difference between a *representation* and a *warranty*:—a *warranty* is always a part of the written policy, and must appear upon the *face* of it; but a *representation* is only a matter of collateral information on the subject of the insurance, and makes no part of the policy. A *warranty* must be *strictly* and *literally* complied with; but it is sufficient if a representation be *substantially* correct. An *untrue* representation is not in itself a breach of the contract, (although by the terms of the contract it may become so,) but if the untrue representation be *material*, it will in itself avoid the policy, either on the ground of *fraud*, or because it has misled the insurer.(*a*)

Macmorran & Co.(*b*) cotton and wool spinners, insured their premises with the Newcastle-upon-Tyne Fire Insurance Company. The policy was dated April 16, 1805, and contained a receipt for the premium, which was accounted for to the company by Hamilton, their agent at Glasgow, through whom the insurance had been effected. The policy was retained by Hamilton till September 5, 1805, when it was delivered to the insured upon their paying the premium. The policy referred to certain printed proposals, a copy of which was, according to the practice of the office, always delivered to the person transacting the insurance; in which proposals it was stated, that where the persons insuring gave a description of the subject, in order to its being insured at a lower premium, and that where there should be fraud or false swearing in stating the amount of the loss, the policy was to be of no force. Certain classes of buildings were likewise specified, according to the particulars of which the premium was to be lower or higher, and the premises in question were warranted to be of the first class, for which the lower premium only was charged. On December 7, 1805, the mill was burnt, and the insurers refusing to pay the sum claimed for the loss,

(*a*) Roberts v. Fonnereau, 1 Park, 285, 7th ed. Stra. 327.

(*b*) Newcastle Fire Insurance Company v. Macmorran & Co. 3 Dow, 255.

the insured brought an action, regularly preceded by an arrestment ad fund. jur. before the Court of Session, concluding for payment of 1647*l.* and interest from December 7, 1805. A condescendance having been ordered, the insurers stated two charges as the ground of their refusal to pay: first, that there was fraud and false swearing as to the amount of the loss; second, that the fire was intentional. Upon proof it appeared that there was no foundation for this latter charge; but it also appeared, that at the time of the date of the policy the premises were of the second class, contrary to the warranty. In answer to this it was alleged, that Hamilton, the agent of the Newcastle Company, had taken it for granted that the premises were of the first class, and made out the policy accordingly, without any representation on the part of the insured; and that before the policy was delivered, and the loss happened, the premises had been altered so as to bring them within the first class; it did not appear very distinctly in proof, how the demand of 1647*l.* was made up. The Court below decerned against the insurers in terms of the libel, and from this decision the Newcastle Company appealed.

Lord Eldon, C.—This is an appeal by the Newcastle Company from a judgment of the Court of Session, by which they were held liable in the payment of a sum of 1647*l.* upon a policy of insurance, and the question is whether this judgment was right or not. The summons, which is in the nature of our declaration, stated, that the Newcastle Company were indebted to the pursuers in a sum of 1647*l.* in terms of a policy dated April 16, 1805, and concluded for payment accordingly.

The policy itself was in these terms: "Whereas Mr. Hugh "M'Morran & Co., &c. have paid the sum of 21*l.* 5*s.* 8*d.* "to the society of the Newcastle-upon-Tyne Fire Office; "and do agree to pay, or cause to be paid, to the said "society, at their office in Newcastle-upon-Tyne, the sum "of 17*l.* 17*s.* on the 24th day of June, 1806, and the like "sum of 17*l.* 17*s.* yearly, on the 24th day of June, during "the continuance of this policy, as a premium for the in-

" surance from loss or damage by fire, of 50*l.* on mill-
" wright's work, including all the standing and going gear
" in their mill, which is used as a cotton and woollen mill,
" situated at Garschew, being in their own occupation
" only, and stone built and slated; 550*l.* on clothmaker's
" work, carding and breaking engines, and all moveable
" utensils in the second floor, occupied as a cotton mill;
" 160*l.* on stock of cotton in the same; 600*l.* on cloth-
" maker's work, carding and breaking machines, and all
" moveable utensils in the first floor, occupied as a woollen
" mill; and 350*l.* on stock of wool in the same:" then followed this very material passage, " warranted that the
" above mill is conformable to the first class of cotton and
" woollen rates delivered herewith."

The materiality of it consisted in this, (though in one view, whether it was material or not did not signify, if it was a condition precedent,) that if it was of the second class, and not of the first, a larger premium ought to have been given. And then it goes on, " Now, know all men
" by these presents, that from the day of the date hereof
" until the said 24th day of June, 1806, and so from year
" to year, so long as the said Hugh M'Morran & Co. shall
" duly pay, &c. the sum of 17*l.* 17*s.* &c. and the same shall
" be accepted by the trustees or acting members of the said
" society for the time being, the stock and fund of the said
" society shall be subject and liable to pay, &c. all such
" damage and loss as the said Hugh M'Morran & Co.
" shall suffer by fire not exceeding the sum of 1700*l.* &c."
and then followed at the bottom an entry of receipt of the government duty of 2*l.* from April 16, 1805, up to the 24th of June, 1806. Their lordships would observe the materiality of that, as this instrumeut could never have been produced in Court, if it were only on account of the revenue, save as a policy of April 16, 1805, on which, as a policy so dated, the demand could have been made. But whether that was so or not, the demand was made on this policy. On June 24, 1806, the premium must again be paid, and the duty to government, and whether the demand was on

the policy originally entered into, or on the *renewed* policy, it must be on a policy liable to such a duty, and of this date.

In the appellant's case it is stated, that the printed proposals formed part of the contract, and that besides being referred to, a copy is always delivered to the party insuring: and that it is there set out, among other things, that if any "person or persons shall insure his, her, or their houses, "mills, &c. and shall cause the same to be described in "the policy otherwise than as they really are, so as the "same shall be insured at a lower premium than proposed "in the table, such insurance shall be of no force." As to their so setting it out in their printed proposals, in the case of a warranty, it is unnecessary to consider that; for if there is a warranty, the person warranting undertakes that the matter is such as he represents it; and unless it be so, whether it arises from fraud, mistake, negligence of an agent, or otherwise, then the contract is not entered into; there is in reality no contract.

Nature of a warranty.

Then they further state, that by another article of these proposals it is provided, "that all persons insured by this "society sustaining any loss or damage by fire, are forth-"with to give notice thereof at their office in Newcastle, "and as soon as possible after, to deliver in as particular "an account of their loss or damage as the nature of the "case will admit, and make proof of the same, by their "oath or affirmation, according to the form practised in "the said office, and by their books of account or other "proper vouchers, as shall be reasonably required." That they shall also procure a certificate under the hands of the minister, &c. and others relative to the cause of the loss, "and until such affidavit and certificate shall be made and "produced the loss-money shall not be payable, and if "there appear any fraud or false swearing, such sufferers "shall be excluded from all benefit by their policies."

They further represent that in the second set of proposals for the insurance of cotton mills, &c. certain classes of

buildings were specified, according to the particulars of which the premium is at a lower or higher rate.

Thus, class 1 comprehends " buildings of brick or stone " and covered with slate, tile, or metal, having stoves fixed " in arches of brick or stone on the lower floors, with up- " right metal pipes carried to the whole height of the " building through brick flues or chimnies, or having com- " mon grates, or close or open metal stoves or coakles " standing at a distance of not more than one foot from " the wall, on brick or stone hearths, surrounded with " fixed fenders." I request your lordship's particular attention to the following words, " *and not having more* " *than two feet of pipe leading therefrom into the chim-* " *ney;* and in which, or in any building adjoining thereto, " although not communicating therewith, no drying stove " or singeing frame shall be placed."

Class 2 comprehends " buildings of brick or stone, and " covered with slate, tile, or metal, which contain any " singeing frame, or any stove or stoves having metal pipes " or flues more than two feet in length, and in which, or " in any building adjoining thereto, although not commu- " nicating therewith, no drying stove shall be placed."

As I understand it, the reason for requiring a higher premium for mills of the second class is, that the greater length of the pipe increases the danger. If the pipe of the stove is a yard in length, for instance, the difference arises from this, that if the pipes be more than two feet, the danger is increased beyond what belongs to pipes of that length. But it is immaterial whether I understand this or not; for if the mill *was warranted as being of the first class, it must be such as it is warranted to be,* unless there is something to oust the warranty, otherwise there is no contract.

Then this mill was burnt; and an action was brought to compel payment, to which defences were given in. As to that defence which was the most unwelcome to hear, viz. that the premises had been wilfully set on fire, it appeared

that there was no ground for it; and the Court of Session seems to have thought that there was no ground for the imputation of fraud and over-value. It is not likely at any rate that the articles were undercharged; and it was extremely difficult to make out a case of over-value where the books and papers were all destroyed, and when the amount of these improvements and the value of spinning jennies and such articles were to be calculated. But though one cannot help believing that enough was charged, yet it might be dangerous to say under the circumstances that that defence ought to be sustained.

But there was another very material point of defence stated, that this mill, which was *warranted as being of the first class,* with a pipe of two feet, *was in reality of the second class;* and that being of the second class, whether there was fraud or not, whether the mistatement on the part of the insured arose from fraud, or from mere error or inattention, or the mistake of an agent, (unless they were misled by the agent of the Newcastle Company,) or from whatever other cause, the contract never had effect.

Then evidence was gone into as to whether the mill was of the first or second class. The Court of Session seems to have thought it immaterial whether it was or not. But if the mill was warranted as of the first class, and was really of the second class, the judgment of the Court below was clearly erroneous; for it is a *first principle* in the law of insurance on all occasions *that where a representation is material, it must be complied with;* if immaterial, that immateriality may be inquired into and shown; but that if there is a warranty, it is part of the contract that the matter is such as it is represented to be. Therefore the materiality or immateriality signifies nothing. The only question is as to the mere fact. It is proposed then that the matter should stand over for a day or two, in order to examine the case again, for the purpose of further inquiry as to that fact; but my present impression is, that the mill was not such as it was warranted to be, and that therefore all consideration of fraud or overvalue is out of the ques-

tion, unless it can be effectually answered that the insured were misled by the insurers or their agent. Then they say that the misrepresentation was owing to the agent of the Newcastle Fire Company. I cannot say, however, that they have made out that point, and it is denied on the other side, and may therefore be laid out of the question.

Then they say further, that there was no effectual policy till the premium was paid, and refer to the terms of the fourth article of the printed proposals, which declares "that no insurance is considered by this office to take "place till the premium be actually paid by the insured, "his, her, or their agent or agents." The premium they say was not paid till a considerable time after the date of the policy, that the alteration was made which brought this mill within the description of the first class of mills before the premium was paid, and that the alteration had been communicated to the agent of the company. The company deny that any such communication was made, and even if it had been made, it would have been still necessary to consider how far that circumstance could alter the law as applicable to the case. But as the fact was denied, and there was no proof of it, that point may be considered as out of the question. With respect to the effect of the article referred to, the appellants contend that it did not relate to the first policy, but to the renewals of policies. But in the present case it is not necessary to consider whether it related to the first policy or any renewals of it, as they say that as between the respondents and them the premium had in point of fact been paid before the alteration took place, as the Scotch agent had accounted for it to his constituents, the Newcastle Company, before the period of the alteration, and it had therefore become a personal debt due to him from the Scotch Company. That may be considered as an answer to the argument raised upon that ground. But suppose that were entirely out of the question, we must in this case, as in all others, proceed secundum allegata et probata, according to what is alleged and proved. If they could succeed at all on this summons

it must be on a policy or contract dated April 16, 1805, and when they have founded upon that only, they cannot afterwards in that action turn round and say, though we cannot succeed on that policy we are entitled to recover on a subsequent contract. See how the contract would be varied. This was a bilateral contract of the date of April 16, 1805, from which period to June 24, 1806, the premium was acknowledged to have been paid; and it was agreed that a certain premium should continue to be paid on June 24, de anno in annum. Can your lordships convert that into a transaction commencing, not in April, but in September, 1805.

Suppose the fire, after being smothered for some time in the mill, had burst out the day before the money was paid to the agent of the Newcastle Company, could that company say, " Though the premium has been paid us by our " agent, and we own the receipt of the money, yet as you " did not pay the agent we are not bound." Acquitting M'Morran & Co. then of all fraud in the business, the question is reduced to this: " Are you M'Morran & Co., " looking to the facts and evidence as applicable only to the policy " of April, 1805, entitled to recover under this contract."

I have said so much, because I consider it as of the greatest importance that the mercantile law should be uniform all over the country, and because it is dangerous therefore to decide these questions of insurance without being sure what may be the effect of the decision, and the nature of the doctrine which may result from it. If this is to be taken as a contract of April, 1805, and the premises were not of the class of which they were warranted to be, it appears to me quite clear that the respondents ought not to recover. If the Court of Session was of opinion that the danger and risk was not greater in mills of the second class than in those of the first class, though that were sworn to by five hundred witnesses, it would signify nothing. The only question is, " what is the building de " facto that I have insured?" The judgment of the Court below was reversed.

It is the practice of most offices to insert the statements or representations, made at the time of effecting the insurance, in the body of the policy. By this means they become a warranty, and preclude questions from arising upon the subject of the *materiality* or *immateriality* of the statements.

Concealment of a material fact vitiates the policy.

5. *Concealment,* or the suppression of any fact or circumstance *material* to the risk, will be equally fatal to the contract; without any special agreement, it is a species of *fraud,* suppressio veri, which renders the contract void from the commencement; but it is not solely on the ground of fraud that concealment avoids the contract; the omission to state material circumstances, though the omission be the result of accident or negligence, will avoid it; and a fortiori if any thing be suppressed or misrepresented from *fraud.* (*a*)

"Insurance is a contract upon speculation, the special facts upon which the risk is to be computed lie commonly in the knowledge of the insured only. The underwriter trusts to his statement, and proceeds upon confidence that he does not keep back any circumstances within his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen by mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement." (*b*)

The insured cannot insist upon the confirmation of a contract invalid in itself, by tendering an increased premium.

The insured has no right by tendering an increase of premium to require the insurer to confirm a contract invalid in itself; for the insurer has in such a case a right to say,

(*a*) Per Lord Mansfield, Carter v. Boehm, 1 Bla. 594; 3 Bur. 1909. Ratcliffe v. Shoolbred, 1 Park, 290, 7th Ed.

(*b*) Per Lord Mansfield, in Carter v. Boehm, 3 Burr. 1905, 1 Bla. 594.

that he would not have subscribed the policy upon *any terms* if he had been informed of the circumstances which were withheld from him. His intention being to undertake only for the risks that were communicated to him, if he is deceived, that is sufficient to avoid the contract: nor is the concealment less fatal, though the circumstance concealed turn out to be unfounded in fact, though supposed to exist. (*a*)

The following case has occurred upon the doctrine of concealment:—

An action of covenant was brought against the directors of the Phœnix Fire Office, upon a policy of insurance dated July 25, 1814, effected by the plaintiff on a certain warehouse in Heligoland. The policy referred to a letter of the plaintiff of July 11, 1814, containing the instructions for the insurance and certain conditions of the policy annexed: amongst which was "that if any person should insure his buildings or goods, and should cause the same to be described in the policy otherwise than as they really were, so as the same were charged at a lower premium than was therein proposed, such insurance should be of no force; and that persons should give in a particular of their losses, signed and verified upon oath: and if there appeared any fraud or false swearing, the claimant should forfeit his claim to restitution or payment." The defendants, amongst several pleas, pleaded, that before and at the time of the writing the plaintiff's letter referred to in the declaration, the warehouse, and the merchandize contained therein, being the premises intended to be insured, were in imminent peril of being consumed by fire, which the plaintiff at the time of writing the letter well knew: that the policy was effected upon the representation contained in the letter, but that the plaintiff fraudulently, and with intent to induce the defendants to effect the policy, concealed from the defendants the fact, that the premises were in such peril; by reason of which concealment the defendants averred that the

That the premises to be insured were in imminent danger of being burnt almost immediately before the order for insurance, is a fact that ought not to be concealed, and will vitiate a policy.

(*a*) Emerig. tom. i. p. 20, 21, 68, 69. Seaman v. Fonnereau, 2 Stra. 1183. Lynch v. Dunston, 14 East, 494.

policy was void. The plaintiff replied, and defendants joined issue on the replication. The cause was tried at Guildhall, at the sittings after Trinity Term, 1815, before Gibbs, C. J. It appeared that the plaintiff was possessed of two warehouses in Heligoland, one of which was separated by only one other building from the workshop of Jasper, a boat builder, wherein a fire broke out in the evening of the 11th of July. That fire, however, was apparently extinguished in half an hour, and four persons were employed by the plaintiff, who was a magistrate there, to watch during the night, lest the fire should again break out. The plaintiff in the same evening wrote the letter referred to in the declaration to his agent in London, requesting him to effect the insurance against fire for three months at 400*l.* upon the plaintiff's warehouse, (therein described,) as also upon the coffee in casks and bags then stored in the same warehouse, value 3500*l.* The mail for England was to sail that day, and was then closed; but the plaintiff procured the master of the packet-boat to take the letter with him and put it into the post office at Cuxhaven, so that the letter left Heligoland at a late hour on the same night, and it reached England by the same packet on the 24th, and the plaintiff's agent on the following day effected the policy in question. Early in the morning of the 13th a fire again broke out in the workshop of Jasper, the boat builder, and consumed the premises insured. The jury acquitted the plaintiff of any fraud or dishonest design, the fire being apparently extinguished when he ordered the insurance, but thought that the circumstance of the fire on the 11th ought to have been communicated to the defendants, who without this information did not engage on fair grounds with the plaintiff, and for whom, under these circumstances, they gave their verdict. A motion was afterwards made to set aside the verdict and have a new trial, but the Court refused the rule.(*a*)

(*a*) Bufe v. Turner, 6 Taunt. 338. 2 Marsh. Rep. 46.

6. In the policy of the Royal Exchange, and most other offices, is contained the following exception in the printed proposals: (*a*)—"No loss or damage by fire happening by any invasion, foreign enemy, or any military or *usurped power* whatsoever, will be made good by this company."

The construction of the words "usurped power" contained in the exception in a policy.

A question arose in the following case: (*b*) what species of insurrection or rebellion was an *usurped power* within the meaning of the provision? And it was held by three judges of the Common Pleas (including the Chief Justice) against the opinion of Mr. Justice Gould, that it meant only to extend to houses set on fire by means of an *invasion* from abroad, or of an *internal rebellion*, when armies are employed to support it. An action of covenant was brought against the defendants upon a policy of insurance on a malting office at Norwich, in which policy was the proviso before mentioned. The defendants, amongst other pleas, pleaded that it was burnt by *an usurped* power: the plaintiff replied that it was not burnt by *an usurped power*, and thereupon issue was joined. The cause was tried at Norwich assizes; a verdict was given for the plaintiff, subject to the opinion of the Court upon the following case, viz.: upon Saturday, the 27th of November, a mob arose at Norwich upon account of the high price of provisions, and spoiled and destroyed divers quantities of flour, thereupon the proclamation was read, and the mob dispersed for that time. Afterwards another mob arose, and burnt down the malting office in the policy mentioned. The question was, whether the plaintiff was entitled to recover in this action. The case was twice argued at the bar, and the Court took time to deliberate. After which, as the judges differed in opinion, they delivered their opinions *seriatim*. Mr. Justice Gould was of opinion, that the malting office being burnt by the mob who rose to reduce the price of provisions, the same was burnt by an *usurped*

(*a*) That the proposals form a part of the contract, if referred to, see Oldham v. Bewicke, 2 H. Bla. 577. Routledge v. Burrell, 1 H. Bla. 254. Wood v. Worsley, 2 H. Bla. 574; 6 T. R. 710.

(*b*) Drinkwater v. the Corporation of the London Assurance, 2 Wils. 363.

power, within the meaning of the proviso in the policy, and he cited Popham, 122. Mr. Justice Bathurst was of opinion, that the words "usurped power" in the proviso could only mean an invasion by foreign enemies to give laws and usurp the government thereof, or an internal force or rebellion assuming the power of government by making laws, and punishing for not obeying those laws. That the plea did not allege "the usurped power" as a rebellion, that a mob rose at Norwich on account of the price of victuals, and as soon as the proclamation was read they dispersed. Mr. Justice Clive was of opinion, that the words must mean such an usurped power as amounts to high treason, which is settled by the 25th Ed. 3. The offence of the mob in the present case was a felonious riot, for which the offenders might have suffered, but it cannot be said to be an usurped power. Chief Justice Wilmot was of opinion, that the burning of the malting office was not a burning by *an usurped power* within the meaning of the proviso. That the idea of the words "burnt by an *usurped power*" from the context was, that they meant burnt or set on fire by occasion of an invasion from abroad, or of an internal rebellion, when the laws are silent and the firing of towns is unavoidable. The difference between a rebellious mob and a common mob is, that the first is high treason; the latter, a riot or felony. Whether was this a common or a rebellious mob? The first time the mob rises the magistrates read the proclamation, and the mob disperse. They hear the law and obey it. The next day another mob rises on the same account, and damages the houses of two bakers; thirty people, in fifteen minutes, put this army to flight, they were dispersed, and heard of no more. Where are the species *belli* which Lord Hale describes? The mob wants an universality of purpose to make it a rebellious mob or high treason. 1 Hale, P. C. 135. Postea to the plaintiff by three judges against one.

The construction of the words "civil commotion."

The Sun Fire Office, it appears, introduced the exception before noticed in the year 1726; and, in the year

1727, they added to the exception the words "civil commotion," thus providing against the effects of internal rebellion, as well as internal invasion; and another question arose upon the construction of the words "civil commotion," in consequence of the outrages committed upon private property in the year 1780.

An action was brought(*a*) on a policy of insurance, to recover from the Sun Fire Office a satisfaction for damage done to the plaintiff's house and goods by rioters. The plaintiff was a Roman Catholic, and his house and effects were set on fire by the rioters. The office defended this action, considering that they were protected by the proviso "that they would not answer for any loss or damage by fire happening by any invasion, foreign enemy, *civil commotion*, or any military or usurped power whatsoever." The point was argued at length by the counsel on both sides.

Lord Mansfield, in his address to the jury, said, "most undoubtedly every man's leaning must be to the side of the plaintiff, in order to divide the loss in so great a calamity, but the leaning must be governed by the rules of law and justice; and the only question that arises for your determination and that of the Court is singly upon the construction of *two words* in the policy. It will be necessary, in order to investigate this matter, to go into the history which has been opened and explained to you of other insurance policies. In the year 1720, the London Assurance Company put into their policies all the words here used, except *civil commotion*. Whatever fire happens by a foreign enemy is clearly provided against; when they burn houses, or set fire to a town, that is also provided for. What is meant by military or usurped power? They are ambiguous, and they seem to have been the subject of a question and determination. They must mean rebellion when the fire is made by authority; as, in the year 1745, the rebels came to Derby, and if they had ordered any part of the town or a single house to be set on fire, that would have been by

(*a*) Langdale v. Mason, 2 Park, 657, 7th Ed.; 2 Marsh. 793.

authority of a rebellion. That is the only distinction in the case. It must be by rebellion got to such a head as to be under authority. In the year 1726, some years after the London Assurance Company had done it, the Sun Fire Office put in the exception; and, in 1727, they put in other words; they do not keep to the form of the London Assurance; they do not say by invasion from foreign enemies merely; they clearly provide against rebellion, determined rebellion with generals who could give orders. Though this be so guarded, the Sun Fire Office did not think it answered their purpose, and therefore they took the words *civil commotion.* Not only using those words, applicable to guard against a foreign enemy, against a rebellion, where there are officers and leaders that can give authority and power, but they add other words as general and untechnical as can possibly be used, '*civil commotion,*' not civil commotion that amounts to *high treason.* They avoid saying 'civil commotions' that amount to misdemeanours; but they use a general expression, "if the mischief happens from a civil commotion," taking the largest and most general sense of the words that the language will allow; they do not even say a riot. In that case, they do not say committing a felony, but speak of fire occasioned by civil commotion. The single question is, whether this has been a civil commotion. If there be a case to which these words can be applicable, it is to a case of this sort. I cannot see any of the other words to which it can be applied. Usurped power takes in rebellion, acting by usurped powers amongst themselves. From a foreign enemy the office is secured, but what is a civil commotion? It is something else. The present was an insurrection of the people resisting all law, setting the protection of the government at nought, taking from every man who was the object of their resentment that protection, as appears from the evidence given by the witnesses upon the facts, and which you all know as if no witnesses had been produced. What was the object and end of this violent insurrection? *It certainly was meant to aim at the very vitals of the*

constitution." His lordship then stated the leading particulars of the well known disturbances in 1780. "What is this but a *civil commotion?* No definition has been attempted to be given of what it is. It is said that this is a civil commotion distinct from usurped power and rebellion. It is admitted that this kind of insurrection may amount to high treason; and, to be sure, it may. But the office do not put their expectation upon trying whether they were guilty of high treason or not. There is no manner of doubt that this was an insurrection for a grand purpose, to take from a set of men the protection of the law. That is levying war against the king; there is not any doubt of it. It is not put upon that, but on the ground of a civil commotion. It is not an occasional riot, that would be another question. I do not give my opinion what that might be. You will give your opinions whether the facts of the case bring it within the idea of a civil commotion. I think a civil commotion is this; an insurrection of the people for general purposes, though it may not amount to a rebellion, where there is an usurped power. If you think it was such an insurrection of the people for the purposes of a general meeting, though not amounting to a rebellion, but within the exception of the policy, you will find for the defendants. If not, you will find for the plaintiff." The jury found for the defendants.

The plaintiff, Mr. Langdale, afterwards recovered satisfaction for the loss he had sustained by bringing an action against the *Hundred*, under the stat. 1 Geo. 1, c. 5, s. 6.

Right of an office paying a loss to stand in the place of the insured as against the hundred.

8. Where a riotous demolition by fire had taken place under stat. 1 Geo. 1, c. 5, and the office paid the loss to the insured even without suit, it was held that the office had a right to stand in the place of the insured, and to proceed against the hundred in the name of the insured.

An action (*a*) was brought against the *hundred* on the above-mentioned statute, to recover satisfaction for damage sustained by the plaintiff by the demolition of his house in

(*a*) Mason v. Sainsbury, 2 Marsh. Ins. 796, 3d ed.

the riots of 1780. There was a verdict for the plaintiff, with 259*l.* damages, subject to the opinion of the Court on a case, which stated in substance that the plaintiff had insured his house in the Hand in Hand Fire Office; that the office had paid the loss without any action being brought against them; and that this action was brought against the hundred in the plaintiff's name, and with his consent, for the benefit of the insurance office, and to reimburse them the loss they had paid. The question was, whether, as the plaintiff had already received a satisfaction, this action could now be maintained against the hundred on behalf of the insurers. It was contended, on the part of the hundred, that it was the policy of the act, besides the inducement to suppress riots, to divide the loss, and prevent the ruin of individuals; but there could be no reason of policy or justice to extend this beyond the party himself to bodies or individuals who have wilfully put themselves into this danger; that though it was true that a man, having different remedies, might pursue either, and it was no defence to the one that he might have pursued the other, yet, when he has recovered by one, he shall not afterwards seek a second satisfaction by the other; but the Court were unanimously of opinion that the office had a right in this case to recover against the hundred in the name of the insured. Lord Mansfield said, " Though the office paid without a suit, this must be considered as without prejudice; and it is, to all intents, as if it had never been paid. The question comes to this: Can the owner of the house, having insured it, come against the hundred under this act? Who is first liable? If the hundred be first liable, still it makes no difference; if the insurers be first liable, then payment by them is a satisfaction, and the hundred is not liable. But the contrary is evident from the nature of the contract of insurance. It is an *indemnity*. We every day see the insured put in the place of the insurer. In abandonment it is so, and the insurer uses the name of the insured. It is an extremely clear case. The act puts the hundred in the place of the trespassers; and, on principles of policy, I

am satisfied that it is to be considered as if the insurers had not paid a farthing." Mr. Justice Willes said, "I cannot distinguish this from the case of an escape. If the sheriff pays, he has his remedy over against the party. Though the hundred is not answerable criminally, yet they are not to be considered as wholly free from blame. They may have been negligent, which is partly the principle of the act." Mr. Justice Ashhurst said, "At all events the plaintiff is entitled to a verdict to the amount of the premium, having had no compensation as to that. But, on the larger ground, I am of opinion that the hundred is liable in this action for all the damage sustained by the plaintiff." Mr. Justice Buller said, "Whether this case be considered on strict or on liberal principles of insurance law, the plaintiff must recover. Strictly, no notice can be taken of any thing out of the record. The contract with the office, if strictly taken, is a wager; literally, it is an indemnity. But, on the words, it is only a wager, of which third persons shall not avail themselves. It has been rightly admitted that the hundred is put in the place of the trespassers. How could the trespassers have availed themselves of the satisfaction made by the office? Could they have pleaded it by way of accord and satisfaction? It was not paid as a satisfaction for the trespass, and the facts of the case would not have supported such a plea. The best way is to consider this case as a contract of indemnity, in which the principle is, that the insured and insurer are as one person, and in that light the paying before or after can make no difference."

9. By stat. 7 & 8 Geo. 4, c. 31, s. 2, the above-mentioned stat. 1 Geo. 1, st. 2, c. 5, has been repealed, as also stat. 9 G. 1, c. 22, stat. 22 Geo. 2, c. 46, stat. 57 Geo. 3, c. 19, and stat. 3 Geo. 4, c. 33, by which the hundred had been made liable for injuries to private property. And it is enacted by stat. 7 & 8 Geo. 4, c. 31, s. 2, "that if any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England

The law as to remedies against the hundred.

and Ireland, duly registered and recorded, or any house, stable, coachhouse, outhouse, warehouse, office, shop, mill, malthouse, hop oast, barn or granary, or any building or erection used in carrying on any trade or manufacture, or branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or branch thereof, or any steam-engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon way, or trunk for conveying minerals from any mine, shall be *feloniously demolished, pulled down,* or *destroyed,* wholly or in part, by any persons *riotously* and *tumultuously* assembled together, in every such case the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred, by whatever name it shall be denominated, in which any of the said offences shall be committed, shall be liable to give full compensation to the person or persons damnified by the offence, not only for the damage so done to any of the subjects hereinbefore enumerated, but also for any damage which may at the same time be done by any such offenders to any fixture, furniture, or goods whatever, in any such church, chapel, house, or other of the buildings or erections aforesaid."

By the 3d section it is enacted, " that no action or summary proceeding as thereinafter mentioned, shall be maintainable by virtue of the act for the damage caused by any of the said offences, unless the person or persons damnified, or such of them as shall have knowledge of the circumstances of the offence, or the servant or servants who had the care of the property damaged, *shall, within seven days after the commission of the offence, go before some justice* of the peace residing near and having jurisdiction over the place where the offence shall have been committed, and shall state upon oath before such justice the names of the offenders, if known, and shall submit to the examination of such justice touching the circumstances of the offence, and become bound by recognizance before him to prosecute the offenders when apprehended; provided also, that no

person shall be enabled to bring any such action, unless he shall commence the same within three calendar months after the commission of the offence."

The following sections prescribe the process against the hundred.

The 30th section of the statute states what it is that constitutes a *felonious demolishing, pulling down,* or *destroying,* which entitles the sufferer to his remedy against the hundred. "If any persons, *riotously* and *tumultuously* assembled together to the disturbance of the public peace, shall unlawfully and with force *demolish, pull down,* or *destroy,* or *begin* to *demolish, pull down,* or *destroy* (any of the subjects before-mentioned), every such offender shall be guilty of *felony,* and being convicted thereof, shall suffer death as a felon.

The words of the statute appear, therefore, to indicate, that mere damage done to a house, (for example, breaking windows,) even by persons riotously and tumultuously assembled, will not give the remedy against the hundred, but there must be either a *demolition, pulling down,* or *destruction,* or such a *beginning* as would intimate an intention on the part of the rioters to *demolish, pull down,* or *destroy.*

Commencement and duration of a policy.

9. In general the risk commences from the signing the policy, the payment of the premium or duty, or of a deposit on account thereof; (*a*) and it will in general end with the term for which it is made. Insurances against fire are in general either annual, or for a term of seven years, at an annual premium; and the offices, as an indulgence to the insured, generally allow fifteen days from the expiration of each year for the payment of the premium for the next succeeding year; and the insured is considered to be under the protection of the policy till the expiration of the fifteen days, provided the premium be paid within that time.

Of the fifteen days allowed for payment of the premium.

In the printed proposals of the Sun Fire Office, and of some others, there is the following article: On bespeaking

(*a*) See Protector Policy.

policies all persons are to make a deposit for the policy, stamp duty and mark, and shall pay the premium to the next quarter day, and from thence for one year more at least; and shall, as long as the managers agree to accept the same, make all future payments annually at the said office within fifteen days after the day limited by their respective policies, upon forfeiture of the benefit thereof; and no insurance is to take place till the premium be actually paid by the insured, his, her, or their agent or agents.

In an action (*a*) against the Liverpool Fire Office, which had adopted the above article, the plaintiffs declared on a policy dated the 10th of Dec. 1788, in which (after reciting that the plaintiffs had paid 7*l.* 10*s.* on the 10th of June, 1789, and the like sum every six months during the continuance of the policy,) it was declared, that from the date of the policy, so long as the plaintiffs should pay the sum of 7*l.* 10*s.* at the times and places aforesaid, and the trustees or acting members of the society should agree to accept the same, the funds of the society should be liable to pay the plaintiffs such damage and loss as they should suffer by fire, not exceeding 6000*l.*, according to the exact tenor of their printed proposals.

The declaration, after setting forth the exact tenor of the printed proposals, stated, that the society had, from the year 1777, been in the practice of insuring for periods less than a year by policies similar to the present, referring in like manner to the same printed proposals, and that they had received the premiums within the fifteen days after the time limited in such policies, and the policies thereupon remained in force. It then stated a loss to the amount of 6000*l.* on the 11th of Dec. 1789, before the expiration of the fifteen days, and before any refusal to accept the renewed premium or to continue the policy. There was a second count, stating, that before the expiration of the fifteen days the plaintiffs tendered at the office 7*l.* 10*s.* to the managers of the society, they then not having disagreed or

(*a*) Tarleton and others v. Stainforth and others, 5 T. R. 695; 1 Bos. & Pull. 483.

refused to accept the same. The defendants, amongst other pleas, pleaded to the first count, that the plaintiffs did not pay the sum of 7*l.* 10*s.* on or before the 10th Dec. as they ought to have done, in order to have continued the policy to the time when the loss happened. To the second count they pleaded that the sum of 7*l.* 10*s.* was not tendered to the managers until after the 10th of Dec. Upon a demurrer to these pleas the Court determined, that, under the above circumstances, the plaintiffs were not entitled to recover, and gave judgment for the defendants. Lord Kenyon said, "It is admitted that the insurance did not extend to half-a-year and fifteen days, and that completely puts an end to the whole case. The plaintiffs stipulated to pay 7*l.* 10*s.* half yearly on the 10th day of June and the 10th of Dec., and that they would, as long as the managers *agreed to accept the same*, make their payments within fifteen days after the time limited; *but no insurance is to take place until the premium be actually paid.* The continuation of the term, therefore, depends on two circumstances, which may both concur, namely, that the insured should pay the 7*l.* 10*s.* and that the insurers should agree to accept that sum. Barely stating these facts is sufficient to show that the plaintiffs are not entitled to recover." The judgment was afterwards affirmed in the Exchequer Chamber.

Soon after this decision the Royal Exchange Assurance Company, the Phœnix, and some other companies, gave notice that they did not mean to take advantage of the judgment so pronounced, but would hold themselves liable for any loss during the fifteen days which are allowed for the payment of the renewed premium upon annual policies, and others for a longer period, but that every policy for a shorter period than a year would cease at six o'clock in the evening of the day mentioned therein.

Effect of notice by an office to determine a contract except

10. And after notice by the Sun Fire Office under the following circumstances to determine a contract, except upon payment of a higher premium, and refusal on the

upon payment of a higher premium.

part of the insured to pay such premium, the insured were held not to be protected by the policy during the fifteen days allowed by the office for the payment of the premium &c. for the following year.

The allowance of the fifteen days is to be considered as forming part of the period covered by the policy for the following year.

The allowance of the fifteen days is to be considered as forming part of the period covered by the policy for the following year, but, in order to discharge the office of liability during that period, there must be notice to determine the contract.

Upon a cause (*a*) tried at Guildhall before Lord Ellenborough, C. J. a verdict was found for the plaintiffs, subject to the opinion of the Court, on the following case.—The defendants, and C. Bewicke, since deceased, were three of the managers and acting members of the Sun Fire Office, being a society for the insurance of property against fire, according to the terms of their printed proposals, which were annexed to this case. An advertisement was published in the public newspapers by the managers of this society, which advertisement has not been retracted, and is as follows:—"Sun Fire Office, 10th July, 1794. In consequence of several applications, the managers of this office do hereby inform the public, that all persons insured in this office by policies taken out for *one* year, or for a longer term, are, and always have been, considered by the managers as insured for fifteen days beyond the time of the expiration of the policies; but this allowance of fifteen days does not extend to policies for shorter periods, which cease at six o'clock in the morning of the day of the expiration of the time mentioned in the policies.—Hugh Watts, Secretary." On the 11th of Nov. 1802, the plaintiffs caused to be effected in the said office the insurance in question to the amount of 3000*l.* and paid the premium and duty, and on that occasion the policy set out in the declaration, which is in the common form used in the office for insuring 3000*l.* on the said property, from the 11th of Nov. 1802, to the 25th of Dec. 1803, was executed on behalf of the office by the defendants and C. Bewicke. The plaintiffs' cotton mill (the

(*a*) Salvin v. James, 6 East, 571.

premises insured) was stone and slated, and conformable to the rules of the first class of cotton rates, &c. and in the plaintiffs' tenure, and they were duly interested in the premises insured. In Nov. 1803, the *defendants gave notice to the plaintiffs*, that *unless they agreed to pay* 1*l.* 18*s.* *per cent.* upon the said insurance as from the 25th of Dec. 1803, instead of 1*l.* 1*s.* per cent. which the plaintiffs paid upon the policy in the pleadings mentioned, *the defendants would not continue the insurance.* To which notice the plaintiffs returned for answer, *that they would not give that sum*, as they had made their premises so secure. On the 7th of Jan. 1804, being *within the period* of fifteen days after the expiration of the policy, the insured premises were consumed by an accidental fire; and on the 18th of January the plaintiffs gave notice of the loss to the agent of the defendants at Durham, and wrote to the office a letter giving them similar notice, and on the same day tendered to the defendants' agent the premium of 1*l.* 18*s.* per cent., the *then* rate of insurance used by the said office, for another year, and the duty; but the defendants by their agents, whose acts were approved and ratified by the office, immediately declared that they did not consider the plaintiffs as insured at the time when the fire happened; whereupon no further steps were taken by the plaintiffs, and no money had been paid. When the loss happened, the plaintiffs had not paid or tendered the premium for another year. The question for the Court was, whether the plaintiffs were entitled to recover?—If they were entitled, the verdict to stand; if not, a nonsuit to be entered.

The only article of the printed proposals particularly referred to in the argument was the third, as follows:—"On bespeaking policies all persons are to make a deposit for the policy, stamp duty and mark, and shall pay the premium to the next quarter day, and from thence for one year more at least, and shall, as long as the managers agree to accept the same, make all future payments annually at the said office within fifteen days after the day limited for their respective policies, upon forfeiture of the benefit

thereof; and no insurance is to take place till the premium be actually paid by the insured, his or her agents."

Lord Ellenborough, C. J., delivered judgment: after stating the pleadings—This question arises on the construction of the advertisement published by the Sun Fire Office on the 10th of July, 1794; and the point to be decided is, whether this advertisement be an engagement by the office to indemnify all persons who may insure their property at that office for a year, for the space of 15 days after the determination of the period of their insurance, without any regard to an intention of continuing the insurance? or whether it must not be considered as having relation to the third article of their printed proposals, and as being to be construed with reference to that article? The terms of the advertisement being general, have furnished the argument, that the right attached as soon as the policy was effected; that no condition being mentioned or referred to in the advertisement, the right does not depend on any thing *ex post facto*, and that it must be understood, not as an extension of the original policy nor as an agreement to grant a new policy, which should have relation back to the determination of the old policy, but as an independent and absolute agreement to indemnify for the space of fifteen days. And on this supposition the declaration is framed, by which it is alleged that, in consideration the plaintiffs would insure for one year, the office undertook that the property of the plaintiffs should be considered as insured for fifteen days beyond the time of the expiration of the policy. To this mode of construing the advertisement, it has been objected, that all insurances by the office, according to the first article of the printed proposals, are to be "by policies signed and sealed by three or more of the trustees or acting managers," and that the office never professed to insure in any other way; and in order to give effect to this term or condition on which the office professes to insure, that the Court ought not to construe the advertisement to be an engagement independent of the terms and stipulations contained in and referred to by the policy,

if by fair and reasonable construction it may be referred to and connected with the policy. The mode of insuring at this office, both before and since that advertisement, has been the same, namely, by a policy under seal referring to certain printed proposals; by the third article of which, it is provided, that all persons bespeaking policies are to make a deposit for the policy, &c. and to pay the premium to the next quarter day, and for one year more at the least; and shall, "as long as the managers agree to accept the same, make all future payments annually at the office within fifteen days after the day limited by their respective policies, upon forfeiture of the benefit thereof," and that no insurance should take place till the premium be actually paid. On the construction of a similar policy, in the case of Tarleton v. Stainforth, 5 T. R. 695, (*a*) the Court held, that until the premium were paid persons who had insured were not protected by this article during the fifteen days; and that the intention of the parties, as it was to be collected from the policy and article, was, that the policy should have no effect until the premium was paid, the object of the provision being to avoid the expense of new stamps, &c.; and, in the course of the argument in the case before us, it has been admitted that the advertisement was published in consequence of that decision, to obviate doubts which had arisen on account of it. And it is, in effect, a declaration by the office, that though the legal construction of the instruments did not bind them to make good losses happening during the fifteen days, unless the premium was previously paid; yet that by the proposals they meant, and their *intention* had been and was, to protect the parties during the fifteen days, though a loss might happen before the payment of the premium; and if that be so, there can be no question but that the advertisement must be construed with reference to the article, and as if the article were qualified and corrected by the advertisement. The policy refers to the printed proposals, and the advertisement must either have the effect of annulling the third article or of varying it, if they cannot wholly

(*a*) Ante, p. 50.

stand together, of which there can be no doubt; and that the true way of understanding the advertisement is as a correction of the article, and not as a substitution of a new provision in its place, will appear from this, that the advertisement does not merely declare how persons insured shall be considered, but how they always have been considered, which must necessarily refer to and respect the engagements the office had before made, that is, the policies and proposals which, before the time of the advertisement, had been executed and published by the office. It is, in fact, a declaration on the part of the office of the construction they at that time did, and always before had, put upon their own instruments; it is no substitution of a new engagement different from what they had formerly made in the place of such former engagements, but an exposition of the sense in which the instruments forming those engagements had been understood by themselves and were to be understood by others. If this be so, it brings us to what will be the true construction of this third article, if it be read as varied by the advertisement; and, if so varied, it would stand as if at the end of the article, after the words "no insurance is to take place till the premium be actually paid by the insured," then had been added this sentence, "that all persons insured at this office by policies taken out for one year, or for a longer term, are considered by the managers as insured for fifteen days beyond the time of the expiration of their policies;" the effect of which would be to confine the words "no insurance is to take place till the premium be actually paid," (on which the Court relied in Tarleton v. Stainforth,) to the premium to be paid on the original effecting of the policy, and to leave the article as to the continuance of the insurance just as if nothing had been said in it as to the time when the insurance was to take place. Suppose then the article to be thus altered, it will still contain the clause of option in the managers to receive the premium, which though it cannot be exercised during the fifteen days, within which the assured may renew his assurance, so as to leave the assurers

liable to a loss within that period, as that would make the advertisement nugatory, for it would be in effect saying that they should be insured or not according as the office should think fit to accept or refuse the premium for another year; yet as the option was most unquestionably intended to enable the office to determine the insurance, and to retain to them the power of refusing to renew it for another year, what is there, in case of their having made their option not to renew the assurance, which entitles an assured to an indemnity for the fifteen days, who is in no condition to renew his insurance? The office had the power at any time during the year of saying to the assured, "We will not contract with you again, we will not receive from you the premium for another year;" and by such declaration, the object would cease for which the fifteen days were allowed, and as no premium would be in such case to be received, no indemnity could be claimed in respect of it. The consideration of the indemnity during the fifteen days is the premium which may be paid within that period; but when that cannot be any longer looked to or expected, the right to the indemnity must determine also. The effect of the third article and advertisement is to give the parties an option for fifteen days to continue the contract or not; with this advantage on the part of the assured, that if a loss should happen during the fifteen days, though he have not paid the premium, the office shall not after such loss determine the contract, but that it shall be considered as if it had been renewed; but this does not deprive them of the power of determining the contract at the end of the term, by making their option within a reasonable time before the end of the period for which the insurance was made. When the premium is received, the effect of it is to give the assured an assurance for another year, to be computed from the expiration of the first policy, and not from the expiration of the following fifteen days, which would be the case if the argument of the plaintiff's counsel were well founded, that the interval of the fifteen days is not comprised in the policy. If that were so, a new policy

and new stamps would be necessary, whereas, according to the present policy, regard being had to its relation to the printed proposals, it is an insurance for one year, and for so long as the parties please, provided the assured pay the annual premium within fifteen days of the expiration of each year; with a restriction of the office alone from determining the policy after the year during fifteen days of the following year, in case a loss should happen during that period; and on this head the argument used by the defendant's counsel from the annual duty on insurances, has weight to show that the understanding of the parties was not that for the *fifteen days* there should be *an absolute indemnity*, as in such case the duties would have been paid for that fractional part, from the non-payment of which the assured could not but conclude that his assurance was not meant to be an absolute unconditional assurance for more than a year, and such as the office had no power to determine until fifteen days after the year's end. Under this view of the question, it will not be necessary to say whether an insurance can be made by parol against the perils insured against by this policy; and as in this case there has been a determination of the contract by the plaintiffs having informed the office that they could not give the increased premium demanded by them for another year, there must be judgment for the defendants.

Nominal misdescription will not vitiate a policy. Introduction of a tar-barrel for the purpose of repairing a building, covered by the common insurance.

11. A nominal misdescription of a building, if substantially correct, will not vitiate the policy, and the introduction of a tar-barrel and fire for the necessary purpose of tarring the building, in consequence of which it was consumed by fire, will not vitiate the policy, though the premium was paid as for a building wherein no fire was kept, and no hazardous goods deposited.

An action (*a*) of assumpsit was brought upon a policy of insurance against the defendants, three of the directors of the Beacon Insurance Company. The policy was effected upon "a barn, situate in an open field, timber-built, and tiled." The conditions indorsed on the policy

(*a*) Dobson v. Sotheby, 1 Mood. and Malk. 90.

required the usual description of the property. The policy was effected at the lowest rate of premium, such as was only payable for buildings of a certain description, where no fire is kept, and no hazardous goods deposited. There were articles fixing a higher rate of premium for buildings of other descriptions, with the same proviso against hazardous goods; and a proviso, that "if buildings of any description insured with the company shall at any time after such insurance be made use of to stow or warehouse any hazardous goods" without leave from the company, the policy should be forfeited. The premises were agricultural buildings, but not such as were strictly to be described as a *barn*, but they were of such a nature that they would have been insured by the company at the same rate, if they had been more accurately described. They required tarring, and a fire was consequently lighted in the warehouse, and a tar-barrel was brought into the building for the purpose of performing the necessary operation. In the absence, and by the negligence of the plaintiff's servant, the tar boiled over, took fire, and communicated with that in the barrel, and the premises were burnt down.

There must be an habitual use of fire or an ordinary deposit of hazardous goods to come within the terms of a policy precluding it.

It was contended that the plaintiff could not recover, 1st. because the premises were incorrectly described as a barn; 2d. because the lighting a fire was a contravention of the terms of the policy, which required that no fire should be kept in buildings on which the rate of insurance in the present case was paid; 3d. that the tar-barrel came under the description of hazardous goods, which was a breach of the condition.

Lord Tenterden, C. J.—If the property insured has not been correctly described, the defendants certainly are not liable; but I do not think there is in this case any misdescription which will discharge them. The word "barn" is not the most correct description of the premises, but it would give the company substantial information of their nature; there would be no difference in their risk, and the insurance would have been at the same rate; whether the word "barn" or a more correct phrase had been used, I

think, therefore, that they are substantially well described. Nor do I think that the other circumstances relied on furnish any answer to the action. If the company intended to stipulate, not merely that no fire should habitually be kept on the said premises, but that none should ever be introduced upon them, they might have expressed themselves to that effect; and the same remark applies to the case of hazardous goods also. In the absence of any such stipulation, I think that the condition must be understood as forbidding only the *habitual* use of fire or the *ordinary* deposit of hazardous goods, not their occasional introduction, as in this case, for a temporary purpose connected with the occupation of the premises. The common repairs of a building necessarily require the introduction of fire upon the premises, and one of the great objects of insuring is security against the negligence of servants and workmen. I cannot therefore be of opinion, that the policy in this case was forfeited; and certainly if it is valid, the circumstance that the fire happened through the negligence of the plaintiff's servant furnishes no answer to the action. (*a*)—Verdict for plaintiff.

It appears that a coffeehouse is not an inn within the meaning of a policy, enumerating the trade of an innkeeper amongst others as doubly hazardous. (*b*.)

(*a*) See Austin v. Drew, 6 Taunt. 436; 1 Holt, N. P. C. 126.
(*b*) Doe d. Pitt v. Laing, 4 Campb. 76.

CHAPTER IV.

OF THE PROOF OF LOSS.

1. *Proof in general.*
2. *Production of the Certificate under the hand of the Minister, Churchwardens, &c. when required by the Conditions.*

1. Most offices have a condition or proposal indorsed on their policies to the following effect: " all persons sustaining any loss or damage by fire are forthwith to give notice to the company, at their head office in London, and *as soon as possible* to deliver in as particular an *account* of their loss or damage as the nature of the case will admit, and make proof of the same by *affidavit* or *affirmation* before a justice of the peace, and produce such *other evidence* as the directors of the company may reasonably require; and *until* such affidavit or affirmation, account, and evidence are produced, the amount of such loss, or any part thereof, shall not be payable or recoverable; and if there appear *fraud* in the *claim* made for such loss, or *false swearing* or *affirming* in support thereof, the claimant shall *forfeit all benefit* under such policy, except such as the directors may think fit to allow." Others have varied this condition, in terms requiring, in addition to the usual requisite evidence, " a *certificate* under the hands of the minister and churchwardens, together with some other reputable inhabitants of the parish, not concerned in such loss, importing that they are well acquainted with the character and circumstances of the person or persons insured, and do know or verily believe that he, she, or they really and by misfortune, without any fraud or evil practice, have

sustained by such fire the loss and damage as his, her, or their loss to the value therein mentioned; but till such affidavit and certificate of such insured's loss shall be made and produced, the loss-money shall not be payable." The offices usually undertake to pay the loss, not exceeding the sum insured, "according to the conditions indorsed on the policy," or according to the exact tenor of the printed proposals. The offices, upon application after a fire, usually furnish the insured with necessary information for proving their loss.

The production of the certificate when required is a condition precedent.

2. It has been held, upon the construction of the policies of the Sun and Phœnix Fire Offices:—1st. That the production of this *certificate* under the hands of the minister and churchwardens, together with some other reputable inhabitants, is a *condition precedent*, without compliance with which the plaintiff cannot recover: 2dly. That the printed proposals, if referred to in the policy, are to be taken as part of the policy.

In Oldman and another, assignees of Ingram, v. Bewicke and others, (*a*) in an action against the Sun Fire Office, where the plaintiffs in their declaration, after stating that the bankrupt, the insured, had conformed to the *above* article, as to the notice, account, and affidavit of loss, stated that the minister of Portsea, in which the loss had happened, resided at a distance from the parish, and was wholly unacquainted with the character and circumstances of the insured, and unable to make the certificate required by the policy; but that the insured had procured and delivered to the office a certificate under the hands of several reputable inhabitants of the tenor required by the article. No notice was taken in any of the pleas of the want of certificate. The cause went to trial, and the jury found a verdict for the plaintiffs for a fifth of the sum demanded. The defendants moved in arrest of judgment, on the ground that the plaintiffs had not set forth in their declaration a sufficient title to recover upon the policy against the defendants. In answer to this application it was said, that it

(*a*) 2 H. Bla. 577.

was grounded on the title being either defective or defectively set forth; that the latter objection was cured by the verdict, and the former waived by the defence set up by the pleas. The Court, however, arrested the judgment. The Chief Justice said, "though I am satisfied that the verdict was right, that the fire was accidental, and that the certificate could not have been procured because the insured had not sustained all the loss claimed; yet the rule of intendment cannot be applied where there is an absolute defect of title, as there is in this case. As to the pleas, they are wholly collateral to the title." Mr. Justice Gould said, "till the affidavit is made and the certificate procured, the money is not payable. The time of payment therefore is not yet come. Though a bonâ fide sufferer, still she is not entitled without a certificate. The stipulation is a *condition precedent*, that there shall be a certificate to show that there is no kind of fraud. Nothing is said about the churchwardens, and the excuse of the minister living at a distance is frivolous."

In the next case upon this subject, upon a policy of the Sun Fire Office, Routledge v. Burrell,(*a*) the declaration, by way of excuse for not producing the certificate, stated, that although application had been made to the proper parties for the certificate, that the defendants, by false insinuations and promises of indemnity, prevailed on the minister, &c. to refuse to sign it. The defendants, as to the first breach of covenant, pleaded, 1st, that the insured had no interest in the goods, &c. insured; 2dly, that they did not prevail on the minister, &c. to sign the certificate. As to the second breach they pleaded, 1st, no interest; and 2dly, that neither the testator in his lifetime, nor the plaintiff since his death, had procured such certificate. Issue was joined upon the three first pleas, and the plaintiff demurred to the last. In arguing that demurrer, it was contended on the part of the plaintiff, 1st, that a condition or restriction could not be annexed to and made part of a deed by words of mere reference to a printed paper distin-

(*a*) 1 H. Bla. 254.

guished only by the date of the year in which it was printed, without any signature, seal, or stamp, to give it authenticity; and 2dly, that the restriction in question, though it were properly annexed to the deed, was bad in itself. Many authorities were cited in support of these propositions; but the Court said, that the matter was too clear to admit of a doubt, and gave judgment for the defendants.

Finally, in the case of Wood and others, assignees of Lockyer and Bream, v. Worsley, (*a*) in an action brought by the assignees of the insured, who had become bankrupts, against the Phœnix, the plaintiffs in their declaration, amongst other things, alleged, that the bankrupts, soon after the loss, procured and delivered to the company a certificate under the hands of divers reputable householders, in the usual form; and that as soon as possible after the loss, they applied to and requested the *minister and churchwardens of the parish to sign such certificate;* but that they, without any probable cause, wrongfully refused to sign such certificate. To the first count the defendants, amongst other pleas, pleaded, that the minister and churchwardens did not wrongfully and without probable cause refuse to sign the certificate, and that neither the bankrupts nor the plaintiffs had procured any certificate from the minister, churchwardens and reputable inhabitants, as is required by the said printed proposals. The cause was tried, and the plaintiffs obtained a verdict for 3000*l.* The defendant moved in arrest of judgment on the same ground as in the case of Oldman v. Bewicke, namely, that the production of the certificate was a *condition precedent* to the payment of the loss, and that the plaintiffs not having averred performance, had shown no title to recover. After the argument, Lord Chief Justice Eyre, Mr. Justice Buller, and Mr. Justice Rooke, seemed to be of opinion, that supposing the printed proposals to be conditions precedent, there had been a performance cy pres; but that in truth the policy being a commercial contract was to be construed liberally, and the true question was

(*a*) 2 H. Bla. 574; 6 T. R. 710.

whether the loss had been fairly incurred. If it had, and it appeared on the record to have so happened, the refusal of the minister and churchwardens was without cause, and therefore the plaintiffs were entitled to maintain their action. But Mr. Justice Heath appeared to differ from the rest of the Court, and time was taken to deliberate. Afterwards judgment was given for the plaintiffs pro formâ, upon the understanding that a writ of error would be brought whichever way the judgment should be given. Upon this writ of error, the Court of King's Bench after two arguments reversed the judgment of the Court of Common Pleas, being unanimously of opinion that the production of the certificate was a *condition precedent*. Lord Kenyon said, he did not see how the term cy pres was applicable to the subject: that the argument founded on this went to show, that if none of the inhabitants of this parish would certify, a certificate from the inhabitants of the next or any other parish would have answered the purpose. But, he said, that the insured *could not substitute* other terms or conditions in lieu of those which all the parties to the contract had originally made: the insured cannot substitute one thing for another. In the case of Campbell v. French,(*a*) his lordship explained the grounds of this doctrine. It was competent to the insurance office to make the stipulations stated in the printed proposals; they had a right to say to individuals who were desirous of being insured, " knowing how liable we are to be imposed upon, we will among other things require that the minister, churchwardens, and some of the reputable inhabitants of your parish, shall certify that they believe that the loss happened by misfortune, and without fraud, otherwise we will not contract with you at all." If the assured say, " that the minister and churchwardens may obstinately refuse to certify;" the insurers answer, " we will not stipulate with you on any other terms."

There is no foundation for the action, and the judgment below must be reversed.

(*a*) 6 T. R. 200.

CHAPTER V.

OF FRAUDULENT LOSSES.

1. *Malicious setting fire with intent to injure.*
2. *General Evidence in support of a Charge of Arson.*

Maliciously setting fire to premises.

THE statute of the 7 & 8 Geo. 4, c. 30, s. 2, enacts, that if any person shall unlawfully and maliciously set fire to any church or chapel, or to any chapel for the religious worship of persons dissenting from the United Church of England and Ireland, duly registered or recorded, or shall unlawfully and maliciously set fire to any house, stable, coachhouse, outhouse, warehouse, office, shop, mill, malt-house, hop oast, barn, or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, with intent to injure or defraud any person thereby, every such offender shall be guilty of felony, and being convicted thereof shall suffer death as a felon.

The material parts of this section are the same as those of stat. 43 Geo. 3, c. 58, under which last statute, sect. 1, E. Gillson was indicted.(*a*) The indictment was for feloniously setting fire to a certain house, being in the possession of the said E. Gillson, with intent to deftaud the London Assurance Company. At the trial, a policy of insurance was given in evidence on the part of the prosecution, by which the prisoner's goods in a house there described were insured against fire; and upon this policy a memorandum was indorsed, stating that the goods insured had

Upon an indictment for arson a memorandum indorsed upon a policy, the former being without a stamp, not receivable in evidence.

(*a*) Rex v. Gillson, 1 Taunt. 25.

been removed from the house described in the policy to another house mentioned in the memorandum, in which last-mentioned house the prisoner was charged with having committed the felony. The policy was properly stamped, but the memorandum had no stamp, and the objection taken for the prisoner was, that in support of the charge it was essentially necessary to show that there subsisted a legally effective contract, and that, by the provision of the stamp acts, the memorandum in question, not being stamped, could not be given in evidence, or be good or available in any manner whatever; and a distinction was taken between the case where an unstamped forged instrument was admitted in evidence against the party charged with having forged it, or with uttering it or knowing it to be forged. (*a*) Another objection was also urged on behalf of the prisoner, that a corporation cannot bind itself by a mere agreement, it can only contract by deed, and, without a contract which could be enforced, the intent to defraud cannot be contemplated. This latter point, however, does not appear to have been much laboured. After argument before eleven of the judges, Mr. Justice Rooke being absent, the prisoner was ordered to be discharged; six of the learned judges being of opinion, as it was understood, that the memorandum was not admissible evidence. Where the intent is laid to defraud the insurers, the policy is the best evidence on their part to show that the house was insured, and the books of the insurance company are not evidence without notice to the insured to produce the policy. (*b*)

Wilful burning shows an intention to injure within the statute.

It has been held under stat. 43 Geo. 3, c. 58, s. 1, and the doctrine is equally applicable to stat. 7 & 8 Geo. 4, c. 30, s. 2, that the act of wilfully burning the property carries within itself sufficient evidence of an intention to injure the owner, without proof of any other act which indicates malice, although the principal object of the former statute was to comprise the case of a person burning a

(*a*) See Hawkeswood's case, 2 East, P. C. 955; 1 Leach's Cr. C. 292; Reculist's case, 2 Leach's Cr. C. 811.

(*b*) Rex v. Doran, 1 Esp. C. 127.

house, of which he was tenant or owner, to the injury of his landlord or neighbour, or to defraud the insurer. (*a*)

General evidence in support of a charge of arson.

2. The *general* evidence in proof of the offence, as in other cases, resolves itself into the probable motives of the prisoner, his opportunity and means of committing the offence, and his conduct; and where the prisoner is charged with setting fire to his own house with intent to defraud the insurers, the value of the property, as compared with the amount insured, appears to be a question of great importance, in order to establish or repel the inference of motive. (*b*)

(*a*) Farrington's case, Russel, 1674.

(*b*) See 2 Starkie on Evidence, 69 ; Rickman's case, East's P. C. 1035.

CHAPTER VI.

OF ASSIGNMENT OF POLICIES.

1. *Assignment in general.*
2. *Assignment of Policy after the Fire happens, with Possession of the Property insured before the Fire.*

Of assignment, and the rules of different offices upon this subject.

It has been before observed, that the insured upon a policy of insurance, in order to recover, must have an interest in the subject of the insurance at the time of insuring, and also at the time the loss by fire happens. The mere assignment of a policy would be useless, unless the subject insured be assigned also; but if a policy be assigned to a person already in possession of the subject insured, and the office allows the assignment, it may bind them, the assignment being as against them to be considered a new contract. Without reference to illegality, it would be highly dangerous to permit any trafficking in policies against fire, and offices would be extremely negligent of their duty to the public if they consented to pay upon a policy where there was no accompanying interest. In the printed proposals of the offices in general it is declared, that, upon the death of an insurer, his interest in the policy shall be continued to his representative, to whom the property belongs, provided such representative, before any new payment be made, procure his right to be indorsed on the policy at the office.

In the proposals of the Hand in Hand Office it is declared, that, if the premises insured should be assigned, the assignment must be entered at the office within forty-two days after they are executed, or else that the assignee shall have no benefit thereby. In the proposals of the Union it is declared, that every member transferring his policy shall, within three months, give notice to the directors, and bring

his policy to the office to have such transfer indorsed. The Westminster Office requires that the assignment shall be entered at the office as soon as possible.

Some of the offices give notice generally upon the policy, that "it shall be of no force if assigned, unless such assignment be allowed by an entry in the books of the office, or indorsed on the policy." Even without this provision, upon the general principles of law, it is very questionable whether the holder could have any legal demand against the insurers without *notice* to them; but this condition, moreover, requires allowance. (*a*) Upon reasonable principles, offices should have the power of exercising a discretion in the selection of the persons whose property they may be called upon to insure, and of late years frauds and fraudulent claims upon fire offices have been so frequent, and to so large an amount, that an attention to the character of the party proposing to insure, has become a subject of considerable importance.

Assignment of policy after the fire happens, with possession of the property insured before the fire, and no consent of the office to the assignment.

2. Although a person may have become possessed of the premises or goods insured before the time of the fire, if the policy of insurance which covers them be assigned to him after the fire happens, and without the consent of the office, he cannot recover.

In July 28, 1721, Richard Ireland (*b*) obtained a policy from the Sun Fire Office for the insurance of his house, the Angel Inn at Gravesend, with his goods therein, and it was thereby agreed, that so long as Ireland should pay 5*s.* a quarter, the society would satisfy the said Ireland, his executors, administrators and assigns, his loss not exceeding 1000*l.* Ireland afterwards died, and his son, being his sole executor, brought the policy to the office, and had an indorsement made thereon, that the same belonged to him, and afterwards paid a year's premium up to Christmas, 1727. In August, 1727, the house was destroyed by fire; and, some time after, Lynch and another (the plaintiffs) applied

(*a*) See insurance upon lives, post, chapter on Assignment of Policies. The principle is equally applicable.

(*b*) Lynch and another, v. Dalzell and others, 4 Bro. P. C. 432, ed. Toml.

to the office; alleged that they had purchased the house and goods of Anthony Ireland; that the same were their property at the time of the fire; that they had an assignment of the policy made to them at the time that the house and goods were assigned, and they produced an affidavit from R. Lynch, in which he swore that their loss by the burning of the house amounted to 500*l.* and upwards; and upon this affidavit was indorsed the certificate from the minister, churchwardens, &c.; but neither in the affidavit nor certificate was any mention made of any loss sustained by the plaintiffs by the burning of any goods, nor was any affidavit made by A. Ireland that he had suffered any loss. The plaintiffs, however, insisted that the office should pay them 1000*l.* for their loss by the burning of the house and goods; and they filed a bill in Chancery setting forth that A. Ireland, on the 24th of June, 1727, for 250*l.* assigned to them a lease of the house and stables, but that the goods for which the plaintiffs, as they alleged, were to pay 500*l.* being intended for one T. Church, who was to hold the inn under them, Ireland, by bill of sale of the same date, sold the same to Church for his own use. The bill also stated the assignment of the policy to the plaintiffs, and that, although the bill of sale of the goods was made to Church, yet the plaintiffs paid the purchase money, and Church assigned the bill of sale to them for securing it, and also released to the plaintiffs his interest in the policy. The defendants (certain directors of the office) by their answer alleged, that the affidavit produced was not agreeable to the proposals; that no assignment of the policy was made to the plaintiffs, nor any assignment of it made to them by Church till after the fire; they insisted that the policies issued by the office were not in their nature assignable, being only contracts to make good the loss which the contracting party himself should sustain, and that no other person was entitled to any benefit from it. Witnesses were examined on both sides. It appeared, upon the plaintiff's own evidence, that the agreement for the assignment of the policy, if any, was not till after the agreement for the pur-

chase of Ireland's term in the house, and that the assignment of it, though bearing date *before*, was not made till some time *after* the fire; so that the agreement for assigning the policy was voluntary on the part of Ireland, and independent of the bargain for the house, and not made till after Ireland's interest in the house was determined, nor carried into execution till after the fire happened. As to the plaintiff's property in the goods, they proved an assignment from Church to them as a security for 300*l.*, but omitted to state *when* this assignment was made, though the defendants, by their answer, had put the fact of time in issue. The respondents, on their part, proved that the office did not insure any persons longer than they continued their property in the thing insured, and, that persons dealing with them might not be mistaken, such notice was usually given. Lord Chancellor King said, " These policies are not insurances of the specific things mentioned to be insured, nor do such insurances *attach on the realty*, or *in any manner go with the same as incident thereto*, by *any conveyance or assignment*, but they are only *special agreements* with the *persons insuring* against such loss or damage as they may sustain. The party insuring must have a *property at the time of the loss*, or he can sustain no loss, and consequently can be entitled to no satisfaction. There was no contract ever made between the office and the appellants for any insurance on the premises in question; not only the express words, but the end and design of the contract with Ireland do, in case of any loss, limit and restrain the satisfaction to such loss as should be sustained by Richard Ireland only; and the indorsement on the policy declared that right to his executor, Anthony Ireland only. *These policies are not in their nature assignable, nor is the interest in them ever intended to be transferable from one to another, without the express consent of the office.* The transactions in the present case, by changing the property backwards and forwards, and rendering it uncertain whose the true property is, raise a suspicion, and fully justify the caution of the office in prevent-

Policies do not attach on the realty, but are special agreements with the persons insuring.

Policies are not in their nature assignable.

ing the assignment without consent of the managers, which method is pursued by all the insurance offices. Besides, the appellant's claim is at best founded only on an assignment never agreed for till the person insured had determined his interest in the policy by parting with his whole property, and never executed till the loss had actually happened." His lordship therefore dismissed the bill. Upon this decree there was an appeal to the House of Lords, and, after hearing counsel on both sides, it was ordered and adjudged that the same should be dismissed, and the decree therein complained of affirmed.

A lessee having an unexpired term for six years and a half in a house, insures for seven years. The house is burnt, and afterwards, but before the expiration of the policy, the insured assigns it to the reversioner without the concurrence of the office, the assignee cannot claim under the policy.

Some years afterwards this case was cited with approbation by Lord Hardwicke, and relied upon by him as the ground of his opinion, in the case of the Sadlers' Company v. Badcock and others. (*a*) Ann Strode, having six years and a half to come in a lease of a house from the plaintiffs, on the 27th of April, 1734, became a proprietor of the Hand in Hand Office by insuring the sum of 400*l.* on the house for seven years, and, on paying 12*s.* down and 3*l.* some time after, the company agreed "to raise and pay out of the effects of the contribution stock the said sum of 400*l.* to her and her executors, administrators, and assigns, so often as the house should be burnt down within the same term, unless the directors should build the said house, and put it in as good plight as before the fire;" and on the back of the policy it was indorsed, that "if this policy *should be assigned, the assignment should be entered within twenty-one days after the making thereof.*" Mrs. Strode's lease expired at Midsummer, 1740. The house was not burnt down till the January after 1740; and she made an assignment of the policy to the plaintiffs the 23d of February after 1740. (*b*) The question was, whether the plaintiffs, the assignees of Mrs. Strode, were entitled to the 400*l.* or to have the house built again, or whether the house being burnt down after Mrs. Strode's property ceased in it, the company were obliged to make good the loss to her assignee of the policy. The company made an order

(*a*) 2 Atk. 554. (*b*) N. B. This was according to the old style.

subsequent in time to Mrs. Strode's policy in 1738, "that whereas policies expire upon the property of the insured's ceasing, if there is no application of the insured to assign or to have the loss made up, then the person having the property may insure the said house in the said office, notwithstanding the term for which the house was originally insured is expired." There was evidence read for the plaintiffs to show that they tendered the assignment to the defendants to enter in their books, but they refused to accept of it.

Lord Chancellor Hardwicke.—"During the progress of this cause, while the defendants seemed to depend chiefly upon the subsequent order, I was of opinion against them; but upon hearing what was further offered, I think the plaintiffs are not entitled to be relieved. There may be three questions made in this cause. 1st. Whether this accident which has happened, is such a loss as obliges the defendants to make satisfaction to the plaintiffs? 2ndly. Whether, upon the terms of the original policy, the office is obliged to do it? 3dly. Which is rather consequential of the former, whether the plaintiffs are properly assignees of Mrs. Strode under this policy? If this matter rested singly upon the policy itself, I should not think it such a loss as would oblige the defendants to make satisfaction under this policy. The state of the case is, Mrs. Strode was only a lessee, her time expired at Midsummer, 1740, the house was burnt down in January after, within the *seven* years; the plaintiffs, the Sadlers' Company, were ground landlords, and entitled to the reversion of the term; upon the 23d of February, seven months after the expiration of the lease, and one month after the fire, the assignment was made, and in consideration of 5*s*. only, so that it must be taken as a voluntary assignment as it stands before me. It has been insisted, on the part of the defendants, that the plantiffs are not entitled to recover as standing in the place of Mrs. Strode, because she had no loss or damage, her interest ceasing before the fire happened. And this introduces the second and third questions. I am of opinion,

it is necessary that the *party insured* should have an *interest* or *property* at the *time of insuring* and at the time the *fire happens*. It has been said for the plaintiffs, that it is in nature of a wager laid by the insurance company, and that it does not signify to whom they pay if lost. Now, these insurances from fire have been introduced in later times, and therefore differ from insurance of ships, because there *interest* or no *interest* is almost constantly inserted, and if not inserted you cannot recover unless you prove a property.(*a*) By the first clause in the deed of contribution in 1696, the year this society, called the Hand-in-Hand Office, incorporated themselves, the society are to make satisfaction in case of any loss by fire. To whom or for what loss are they to make satisfaction? *Why, to the person insured,* and *for the loss he may have sustained,* for it cannot *properly be called insuring the thing,* for there is no possibility of doing it, and therefore must mean insuring the person from damage. By the terms of the policy, the defendants might begin to build and repair within six days after the fire happens. It has been truly said, this gives the society an option to pay or rebuild, and shows most manifestly they meant to insure upon the property of the insured, because nobody else can give them leave to lay even a brick, for another person might fancy a house of a different kind. Thus it stands upon the original agreement. The next question will be, whether the subsequent order, made by the defendants in 1738, has made any alteration. I am of opinion it has not, for it was made only to explain a particular case in the policy; for it might have been a question whether Mrs. Strode could have come before the expiration of the term to examine the books of the office, and therefore this order was made to give her such a power. It has been strongly objected that the society could not make such an order. I am very tender of saying whether they can or not, because, on one hand, it might be hard to say that, as a society, they

(*a*) This case was decided in the year 1743, previous to the stat. 19 Geo. 2, c. 57.

cannot make any by-order for the good of the society; on the other hand, it would be a dangerous thing to give them a power to make an alteration that may materially vary the interest of the insured. The assignment is not at all within the terms of this order, because it is plain it meant an assignment before the loss happened. Now, with regard to the loss happening before the assignment made, Mrs. Strode was entitled to nothing but what was to be paid back upon the deposit. It is plain she thought so; for if she had imagined she had been entitled to 400*l.* would any friend have advised her to make a present of it to the plaintiffs? The case of Lynch v. Dalzell, in the House of Lords, shows how strict this Court and that House are in the construction of policies to avoid frauds. The bill here must be dismissed."

Distinction between fire policies and marine policies.

We may here observe, that as policies of insurance against fire cannot be assigned so as to entitle the assignee to demand the sum insured without notice to the office; (*a*) in this respect they appear to differ from marine policies, in which the contract of insurance is more specifically applicable to the property insured rather than to the owner of it. Indeed, marine policies in England were formerly in blank as to the insured, until some mischiefs having arisen the law was altered by a statute of 25 Geo. 3, c. 44, which statute having been found productive of inconvenience was subsequently repealed by stat. 28 Geo. 3, c. 26, which, though it restrains the making of policies in blank as a general rule, renders it necessary only to insert the name of one or more of the persons interested in the property insured, or of the consignee or consignees, or of the person resident in Great Britain who shall receive the order for or effect such policy, or of the person who shall give the order to the agent immediately employed to negociate or effect such policy.

The right to assign or give the benefit of a marine policy, when the property has been transferred also, does not appear to have ever been disputed. (*a*)

(*a*) See Delany v. Stoddart, 1 T. R. 22. Hibbert v. Carter, 1 T. R. 745.

Another distinction may also be observed between marine policies and those against fire. It is sufficient if a marine policy be effected after the interest in the property commences, if it be made in time to meet the risk insured against,(*a*) for the stat. 14 Geo. 3, c. 48, s. 1, does not extend to marine policies, and such a restraint would be highly prejudicial to commerce; but, as we have seen both by the decisions anterior to the statute, as well as by the statute, the insured must have an interest in the property at the time of effecting an insurance against fire, as well as when the loss happens.

(*a*) Rhind v. Wilkinson, 2 Taunt. 237.

CHAPTER VII.

OF THE AGENTS.

1. *Of the Agents for the Offices.*
2. *Privity between the Crown and the Agents.*
3. *Of the Agents for the Insured.*

1. Upon the payment of a deposit at the head office or to the respective agents, the offices usually hold themselves liable for any loss by fire which may take place between the payment of the deposit and the making out the policy; and the slip, or memorandum of agreement usually delivered at the time of applying to insure, specifies the heads of the contract afterwards to be carried into effect. The powers of the agents, however, differ according to the rule of the different offices. In general, the agents are restricted from definitively undertaking that a policy shall be granted where large amounts are to be insured, or circumstances of doubt or difficulty are involved; and where the agents are not authorized to bind the company, the slip or memorandum should be accompanied with a proviso to that effect.

The general powers of agents of offices.

Where no special regulations are made, the general rule of principal and agent will apply.

Privity between the Crown and the agent of an office to recover the duties by extent.

2. It has been held, that there is a sufficient privity between the Crown and the agent of an insurance office, who had received duties and not accounted for them, to enable the Crown to issue an extent against the agent's goods.

An agent for the County Fire Office became indebted to the office in a large sum of money for premiums and duties received on their account, which he was unable to pay, and he afterwards became bankrupt. It appeared that he had

received 177*l.* in the way of duties to the Crown, and an extent had issued against his property. Mr. Pollock applied, on behalf of the assignees, to have the extent set aside. He argued that it was an experiment made by the insurance office to avoid the payment of the duties themselves, for by stat. 22 Geo. 3, c. 48, (*a*) they were accountable to the Crown for the duties, and that the defendant was liable to the company only, and that the company ought to come in for a dividend like any other creditor. If the extent were enforced it would swallow up all the assets, and no other creditor would get any thing. But the Court were of opinion, that as the defendant had received money which belonged to the Crown, there was a sufficient privity between him and the Crown to enable the extent to be issued."—Motion refused. (*b*)

Agent of the insured.

3. Insurances against fire are not in general effected by agents on the part of the insured, but where such is the case, the general rules as between principal and agent will apply, even if a person voluntarily, and without the expectation of any remuneration for his trouble, undertakes to procure an insurance to be effected, though, perhaps, he is not bound to perform his undertaking; yet if, in fact, he do proceed to execute it, he will be answerable for any negligence or unskilfulness in the conduct of it, as appears by the following case: (*c*)—in an action on the case, the declaration stated that the plaintiff purchased certain premises of the defendant, who had a subsisting policy from the Phœnix Fire Office, which he undertook to get renewed on account of the plaintiff, and regularly transferred to him; that he did, in fact, renew the policy and paid 16*l.* which he charged to the plaintiff, but neglected to get it transferred from himself to the plaintiff by the proper indorsement, in consequence of which the plaintiff, who sustained a loss by fire, was unable to recover on the policy.

An agent for the insured will be answerable for negligence, even without remuneration, under circumstances.

(*a*) See also stat. 55 Geo. 3, c. 184, sec. 32. Appendix No. 2.

(*b*) Rex v. Wrangham. Excheq. May 2, 1831. MS.

(*c*) Wilkinson v. Coverdale, 1 Esp. Rep. 75.

It was admitted that there was no consideration moving from the plaintiff to the defendant, who had gratuitously undertaken to get the policy renewed and transferred, on which Lord Kenyon expressed a doubt whether any action could be maintained on such an undertaking. To remove this doubt, the plaintiff's counsel cited Wallace v. Tellfair, (*a*) a case similar to the present, in which Mr. Justice Buller ruled, that though there be no consideration for one party's undertaking to procure an insurance to be effected by another, yet where a party voluntarily undertakes to do it, and proceeds to carry his undertaking into effect by getting a policy underwritten, but does it so negligently and unskilfully that the insured can derive no benefit from it, an action will lie against him. Lord Kenyon acquiesced in this distinction and suffered the cause to proceed, but the plaintiff failed in the proof of any such undertaking and was nonsuited.

(*a*) 2 T. R. 188, n.

CHAPTER VIII.

OF EQUITIES ATTACHING UPON POLICIES.

1. *In general, no Equity as between Landlord and Tenant.*
2. *Proceeds of Policies in general Payable to Executors, &c.*
3. *But where affected with a Trust, they may be Payable to Heir or Devisee.*

No equity attaches upon the proceeds of a policy in favour of third persons.

It may be sufficient to state, that at present it appears that no equity attaches upon the proceeds of policies in favour of third persons unless there be some contract, or agreement, or trust to that effect. A policy of insurance against fire is a distinct independent contract between the party effecting the insurance and the insured. (*a*)

No equity, in general, as between landlord and tenant.

1. In Brown v. Quilter, (*b*) the plaintiff took premises of the defendant for a term of years, and in the lease covenanted to repair, &c. (*accidents by fire excepted,*) the defendant covenanting in the usual manner for quiet enjoyment; the house was burnt down, the defendant having insured it for 500*l.* and received the insurance money. The defendant neglected to rebuild the house, and the plaintiff refused to pay the rent, which became due after the house was burnt; and the defendant having brought an action for the rent, the plaintiff brought a bill for an injunction, and to compel the defendant either to *rebuild the house* or *pay* the *insurance money* to the plaintiff towards satisfaction of his loss. The defendant insisted upon *his right to the insurance money,* and to *be paid the rent without rebuilding the house,* but offered to discharge the plaintiff from his lease. Lord Northington (Lord Chan-

(*a*) See ante, p. 72.

(*b*) Ambl. 619.

cellor) *seemed* to be of opinion, that in this case, though the covenant did not extend to oblige the defendant to rebuild, yet that when an action is brought for rent after the house is burnt down, that was a good ground of equity for an injunction till the house was rebuilt. The case, however, was afterwards compromised, and it does not amount to a decision; whatever of authority may attach to it, has been very much shaken by Hare v. Groves,(*a*) and Holtzapfell v. Baker.(*b*) Brown v. Quilter, however, differs from these latter cases, inasmuch as the landlord, who had insured, had received the insurance money, and therefore had the value of the thing, which was the subject of the contract with the lessee, and as to him therefore no loss had happened. But, as was urged in argument in Holtzapfell v. Baker, it is extremely difficult to conceive how that distinct contract, merely for the advantage of the lessor, with which the lessee had no concern, can affect the right as between them. It was thrown out by the Lord Chancellor (Lord Eldon) in the course of the argument, that "some of the fire offices reserve the option of paying the money or laying it out themselves, which may make a considerable difference, as that option ought not to affect the lessee;" but to this it was objected, that this option is reserved merely for *their own protection* against fraud, and not for the benefit of the tenant. Although the cases cited do not go precisely to the point of equities attaching upon policies, but to the question of payment of rent by lessees for premises after they have been burnt down, yet from the observations scattered in them, we may come to the conclusion, that the contract of insurance is confined to the parties, and that, as a general principle, no other person has any right in equity to the proceeds.

This doctrine has been confirmed in a much later and stronger case.(*c*) The defendant, by indenture of March 25, 1820, demised to the plaintiff a cotton factory, with the steam boiler, for twenty-one years, &c. reserving a yearly

(*a*) 3 Antr. 687. (*b*) 18 Ves. 115.

(*c*) Leeds v. Chatham, 1 Sim. 149.

rent: the plaintiff covenanted to pay *the rent* during the term, and to *repair* and *keep repaired* the *inside* of the factory, the offices, fixtures, outhouses, and additions, and the steam boiler, engine, and apparatus thereto belonging, so long as the same would last, or could be rendered workable by repair; the defendant covenanted to maintain the *outside* brickwork, plastering, slating, tiling, and all other *outer* parts of the premises in good substantial and tenantable repair. There was *no exception* in respect of *accidents by fire* either in the covenant for payment of rent, or in the covenant to repair. On June 22, 1825, the factory, buildings, and premises were destroyed by fire. After the lease was granted, the defendant insured the factory and buildings for 500*l.*, the steam engine for 100*l.*, the engine house for 60*l.*, and the gearing for 40*l.*, so that the total amount of the sums insured was 700*l.*; and shortly after the fire he received that sum. The defendant had commenced an action against the plaintiff for a year's rent, ending the 24th of June, 1826. The bill prayed that it might be declared that the defendant was bound to lay out and apply the 700*l.*, or a competent part thereof, together with the old materials, in and towards the rebuilding and reinstating the factory and premises, the steam boiler, steam engine, &c. and that he might be decreed forthwith to lay out the same accordingly, the plaintiff offering to make good out of his own monies, what the 700*l.* and the old materials should be insufficient for the purpose, to such extent as he should be deemed liable: and that it might also be declared, that the plaintiff was not bound to pay the rent during such time as the factory, &c. should continue unbuilt and unrestored; and that the defendant might be restrained from farther proceeding in the action. The defendant demurred to the bill for want of equity.

The Vice-Chancellor.—"There being in the lease no exception as to the case of accident by fire, the plaintiff at law continues bound to pay his rent; he continues bound also by his covenant to keep in repair the inside work of the factory, the steam engine, and the other apparatus, and

all the outbuildings and fixtures which were on the premises. On the other hand, the defendant, for want of the exception as to accident by fire, continues bound by his covenant to repair the outer part of the buildings, and also by his covenant to replace the steam boiler and other apparatus during the last fourteen years of the term, and when from long use they are no longer workable, under these covenants the defendant is bound to rebuild the factory, and to cover in the same with proper roofing, and slating or tiling; and the plaintiff is bound to rebuild the outbuildings, and to do all necessary works to complete the inside work of the factory when it is built and covered in by the defendant. It appears to me, that in this respect, equity must follow the law. The plaintiff might have provided in the lease for a suspension of rent in the case of accident by fire, but not having done so, a Court of Equity cannot supply that provision which he has omitted to make for himself; and it must be intended that the purpose of the parties was according to the legal effect of the contract. *With respect to the equity,* which the plaintiff alleges to arise from the defendant's receipt of the insurance money, *there is no satisfactory principle to support it.* The defendant, having so contracted with the plaintiff as to render himself liable to rebuild the outer work of the factory in case of accident by fire, has very prudently protected himself by insurance from the loss he would otherwise have sustained by such an accident. But upon what principle can it be that the plaintiff's situation is to be changed by that precaution on the part of the defendant, with which the plaintiff had nothing whatever to do? The plaintiff has sought his protection in the contract by the covenant which he has required from the defendant, and to those covenants he must alone resort."

Whether proceeds of policy are payable to heir or executors and administrators of insured.

2. If the insurance money, as secured by a policy against fire, is made payable to the insured, his *executors, administrators,* and assigns; and houses and buildings in fee are insured, which afterwards descend to the *heir,* and are

burnt during the continuance of the policy, the executors of the insured, and not the heir, will be entitled to receive the proceeds of the policy. A decision (*a*) to this effect has been made with reference to the constitution and policy of the Hand-in-Hand Office, by one of the articles of which it was declared, that the interest of a member dying should survive to his executors, administrators, and assigns; and by an order of the society, reciting that every insurance became void at the time when the property of the person insured expired, it was ordered, that upon applying at the office and declaring their property in the houses insured to be expired, any persons may have their accounts adjusted and deposits due paid to them; and that if they do not apply nor assign the policy to the person having the property of the house insured, the person possessed of the property may insure the house notwithstanding the former policy be not expired. The policy was made payable to the insured, her executors, administrators, and assigns; and it was declared, that when any assignment of the policy be made, such assignment should be entered in the office books within forty-two days, or else the assignee shall have no benefit. Under the circumstances before mentioned certain houses had descended to the heir, one of the houses was burnt, the policy not being expired, and no assignment to him had been made, the directors of the office refusing to pay upon the application of the heir, he filed his bill, which was dismissed with costs. It was contended, amongst other points, that the executor was a trustee for the heir.

The Lord Chancellor.—" It is utterly impossible to make the executor a trustee. It seems to me perfectly clear upon the plan of this society, which was formed in 1696, (*b*) that it is not like the other insurance offices since established, but that it is a personal contract, not connected with the real property nor affecting the real property. No

(*a*) Mildmay v. Folgham, 3 Ves. 472.

(*b*) In general, however, policies are not made payable to the insured, his *heirs*, &c. but to the executors, administrators, &c.

person can have the benefit of the policy but the personal representative, with whom they make up the account, and who is entitled to the dividend."

Under special circumstances the proceeds of the policy may belong to the heir or devisee.

3. If, however, by the act of the insured, or the party entitled to the benefit of the proceeds of the policy, those proceeds should become clothed with the character of real estate, (*a*) or with a trust, the party entitled to the real estate, as heir or devisee, will become entitled to them, in preference to those who may claim them as personalty.

As where A. was tenant for life, remainder to B. for life, remainder to A. in fee, and during the life of A. houses on the estate, insured by him, were burnt down, and the insurance money was paid to A., and was placed by him in the funds in his name. A. by his will devised the estate to C. in fee, (subject to B.'s life interest,) and his personal estate to B., and made B. his executor, B. applied part of the insurance money to repairing a house upon the estate; the insurance money unapplied remained standing in A.'s name. B. by his will bequeathed the residue of his personal property, after stating the circumstances as to the fund standing in A.'s name, as follows: "Whereas I am sole executor under the will of my brother John Bell, Esq. late of Fludyer Street, Whitehall, deceased, and there is now standing in the books of the Governor and Company of the Bank of England the sum of 1159*l.* 16*s.* 7*d.* Three per cent. Redued Bank Annuities, I hereby inform my executors and sister, Mrs. Lucy Bell, that the said sum of 1159*l.* 16*s.* 7*d.* is part of and belongs to what was the real estate of the said John Bell, of which real estate I am now possessed as tenant for life, &c.; and I do further declare for the information of my executors and others whom it may concern, that the said sum of 1159*l.* 16*s.* 7*d.* is the balance or remainder of monies paid by the Sun Fire Office to the said John Bell for houses belonging to the said real estate, which were burnt down in the lifetime of the said John Bell, and were not rebuilt by him; and which monies so

(*a*) Norris v. Harrison, 2 Mad. 268.

paid to the said John Bell were by him laid out in the purchase of 2817*l.* 5*s.* 7*d.* Three per cent. Reduced Annuities, out of which last mentioned sum, after the decease of the said John Bell, when the house, No. 128, in Leadenhall Street, then belonging to me, was burnt down, I took the sum of 1657*l.* 9*s.* Three per cent. Reduced Bank Annuities, and with the produce of that sum added to the sum of 1125*l.* sterling, which I received from the Hand-in-Hand Insurance Office for the said house, I built the present house, No. 128, in Leadenhall Street, to the great improvement of the said estate," &c. The testator then bequeaths several sums of Bank stock, but not otherwise than as aforesaid referring to the sum of 1159*l.* 16*s.* 7*d.* Three per cents.: and it was held, that under these circumstances the sum was subject to the uses of the settlement, and passed to C. the devisee in fee.

So where a testator had devised and bequeathed all his real and personal estate to the defendant the executrix, charged with an annuity to his widow, who filed a bill for an account and security of the annuity, and a house, the only real estate, was burnt down after the filing the bill, having been insured by the testator in his lifetime, and the policy having been renewed by the defendant; the Court (the Vice-Chancellor) ordered the insurance money to be paid into Court, it being to be taken that the defendant had renewed in the character in which she was entitled to renew, viz. as executrix, and the proceeds as affected with a trust for the benefit of the parties interested in the estate. (*a*)

(*a*) Parry v. Ashley, 3 Sim. 97.

CHAPTER IX.

OF PROCEEDINGS ON POLICIES OF INSURANCE AGAINST FIRE.

1. *Jurisdiction of the Courts of Common Law.*
2. *Arbitration.*
3. *Declaration.*
4. *Pleas to a Declaration upon a Policy under Seal.*
5. *Evidence upon the Trial.*

The jurisdiction belongs to the courts of common law.

1. THE jurisdiction upon questions arising out of this contract exclusively belongs to the Courts of Common Law. Courts of Equity, indeed, sometimes in cases of insurance, as in all others, interpose their authority for the purpose of advancing justice; thus they will compel a trustee to permit his name to be used by the cestui que trust in an action on a policy of insurance,(*a*) or they will issue commissions for the examination of witnesses residing abroad or out of the jurisdiction of the Court, and grant injunctions to stay the proceedings at law until the return of such commissions;(*b*) or they will compel a plaintiff at law to make a full discovery by his answer upon oath of all circumstances within his knowledge touching the matters in question, and the answer may be given in evidence at the trial of the action; or they will compel a plaintiff at law to deliver up or permit an inspection of all papers and documents which are material to the matters in dispute;(*c*) except, however, in such cases, and those in which policies or the proceeds may be affected by a trust, Courts of Equity have no jurisdiction in questions of insurance.

Courts of equity will lend their assistance.

(*a*) Per Lord Hardwicke, Motteux v. London Assurance Comp. 1 Atk. 547.

(*b*) Chitty v. Selwin, 2 Atk. 359.

(*c*) De Ghekoff v. London Assurance Company, 3 Bro. P. C. 525; 2 Marsh. 685.

Bill of interpleader.

A bill of interpleader has been held to lie in favour of an insurance company against the landlord of the premises which have been burnt down after having been insured by him, (and who brought an action against the office upon the policy,) and against the tenant, who filed a bill against the landlord and the office for specific performance of an agreement for a lease, and claiming a right to have the money laid out in rebuilding the premises.(*a*)

Arbitration.

2. The deeds of settlement of most of the companies contain a clause enabling the parties to refer matters in dispute to arbitration. This clause is, however, unnecessary, as without it the parties may, if they agree to do so, refer to arbitration; but if they do not agree, the authority of the supreme Courts at Westminster is so transcendant that nothing but the express words of an act of parliament can take away or abridge their jurisdiction in any case,(*b*) such a clause, therefore, will not *compel* a party not agreeing to a reference to have recourse to one; even a covenant between the parties to refer matters in dispute will not oust the Courts of their jurisdiction.(*c*) If an award be actually made, it will be a bar to an action; or if the parties have submitted their differences to arbitration, and the reference be still depending, it would also appear to be a bar.(*d*)

Policies under seal or not under seal.

Some of the companies issue their policies *under seal*, others *not under seal*. Where a company consists of numerous proprietors it has been thought more advisable, as a further security to the insured, to issue policies under seal, thereby putting it out of the power of the insurers (parties to the deed) from pleading in abatement for want of parties, for otherwise, in strictness, every proprietor ought to be a party. The policy under seal, however, is

(*a*) Paris v. Gilham, Jones v. Paris, Coop. Ca. Chan. 56.

(*b*) 2 Hawk. P. C. 286; 2 Marsh. on Insurance, 684; Kill v. Hollister, 1 Wils. 129.

(*c*) Thompson v. Charnock, 8 T. R. 139.

(*d*) Per curiam, Kill v. Hollister, 1 Wils. 129.

attended with the inconvenience, as against the company, that it is not competent for them to plead the general issue, and give the special matter of their defence in evidence, but must resort to plead specially the several matters of their defence.

The form of action in cases of policies under seal is in general *covenant*. A general form of declaration *in debt* is given against the two public incorporated companies, (the Royal Exchange and the London Assurance,) by stat. 6 Geo. 1, c. 18, s. 4, 11 Geo. 1, c. 30, s. 43, but it is not usually adopted in practice. (*a*)

Declaration upon policies under seal.

3. In a declaration upon a policy under seal, the policy should be recited verbatim, together with all the proposals and conditions to which it refers, constituting a condition precedent, (*b*) and any material variance or omission will be fatal. (*c*) The declaration should also state that the plaintiff, *at the time of making the policy*, and from thence *until the loss and damage*, was *interested* (*d*) in the goods or premises mentioned in the policy to the amount and value of the sum claimed; it should also state the loss by fire, and that the fire did not happen by any invasion, &c. (or by any of the excepted cases,) and that the plaintiff thereby sustained a loss and damage to the amount of the sum claimed. It should also state his compliance with the conditions previously recited, and his payment, and the acceptance by the defendants of the premium, and that the stock and funds of the company are sufficient to pay to the plaintiff the amount of the damages sustained by him. He should then aver the *breach*, that he hath not in any manner been paid or made good his damage, but that the same is unpaid; that the defendants have *broken the covenant*

(*a*) 3 Chitty on Plead. 238, 325.

(*b*) See 3 Chitty on Pleading, 326.

(*c*) 2 Marsh. 686; 3 Chitty on Pleading, 99.

(*d*) By stat. 14 Geo. 3, c. 48, s. 3, in all cases where the insured hath interest in such life, &c. *event* or *events*, no greater sum shall be recovered or received *from* the insurer or insurers, than the amount or value of the *interest* of the insured in such life, &c. or other event or events.

made with the plaintiff, and the damages are generally laid at a sum somewhat larger than the sum insured for. (*a*)

Declaration upon policies not under seal.

When the policy is *not under seal, assumpsit* is the proper form of action to be brought upon it against the insurers; and as the action in such case is founded on a particular and express undertaking made upon a consideration, upon which the law would not, by necessary implication, raise the promise specified in the policy, the plaintiff must declare specially upon it. (*b*) The contents of the declaration upon such a policy are much the same, except in matter of form, as before stated to be essential to the declaration upon a policy under seal, and, as in the latter kind of policy, the contract must be set forth with precision, and any material variance or omission will be equally fatal, (*c*) it is usual to add a count for money had and received, and an account stated, to enable the plaintiff to avail himself of any balance which the defendants may have admitted to be due. (*d*)

Pleas to an action upon policies under seal.

4. The *pleas* to an action of covenant upon a policy under seal necessarily vary according to circumstances. The most usual, however, are an absolute denial that the articles mentioned in the declaration were burnt or consumed, and this plea puts the plaintiff upon the proof of the quantity, quality, amount and value of his loss. Where buildings, ricks, or the like, exposed to public view, are burnt, it is not usual to include them in such a plea: as the declaration usually states that the plaintiff delivered in as particular an account of the loss and damage as the nature of the case admitted of (according to one of the conditions common to most policies); the defendants also, by another plea, usually deny this fact, and this also puts in issue the quantity, quality, amount and value of the articles alleged to be consumed. It is usual also, in another plea, to allege *fraud* in the claim made, where the case warrants it,

(*a*) As to the averment, that the share of the capital of the subscribing directors is more than sufficient to pay the loss or damage, see ante, p. 10.

(*b*) 2 Marsh. 687. (*c*) 2 Marsh. 686.

(*d*) 3 Chitty on Pleading, 99.

which it commonly does whenever the offices are driven to resist an action, and they then refer to the condition with reference to *fraud* and *false* swearing, common to all fire policies, and recited in the declaration, whereby the plaintiff forfeits all benefit under his policy, except such as the company may think fit to allow. As the conditions of most offices require the account of the loss and damage sent in to the office to be verified by affidavit, it is very usual, by another plea, to allege *false swearing* in the claim made; such a plea contains the language of the affidavit, alleges that in such affidavit there is false swearing, refers to the before-mentioned condition, and states in general terms the points on which it is false.

Upon the subject of *bringing money* into Court, the reader is referred to the book of practice.

There is a special clause upon this subject in stat. 19 Geo. 2, c. 37, s. 7, but, upon reference to the preamble (*a*) and general intent of the act, it seems doubtful whether it can be applicable to any other than cases of marine insurance. Some doubts have, indeed, existed upon the subject, from the general language of this particular section. The words are these: " and whereas it is unreasonable that any person or persons, body or bodies corporate, subscribing, sealing, or otherwise executing any policy or policies of insurance, should be put to any costs, charges, or expenses in any suit or action at law to be brought on such policy or policies, in case such person or persons, body or bodies corporate, is or are ready or willing to pay such damages and costs as shall and may be really and bonâ fide due thereon, which at present they are liable to, and often forced unjustly to bear, for that in many cases no money can be brought into Court;" for remedy whereof be it enacted, by the authority aforesaid, " that from and after the said 1st day of August, it shall and may be lawful for any person or persons, body or bodies corporate, sued in any action or actions of debt, covenant, or any other action or actions on

(*a*) It is also thus intituled, " An Act to regulate Insurance on Ships belonging to the subjects of Great Britain, and on Merchandizes and Effects laden thereon."

any policy or policies of insurance, to bring into Court any sum or sums of money; and if any such plaintiff or plaintiffs shall refuse to accept such sum or sums of money so brought into Court as aforesaid, with costs to be taxed, in full discharge of such action or actions, and shall afterwards proceed to trial in such action or actions, and the jury shall not assess damages to such plaintiff, &c. exceeding the sum, &c. so brought into Court, such plaintiff, &c. in every such case, &c. shall pay to such defendant in every such action costs to be taxed."

Evidence upon the trial.

5. Upon *the trial* the plaintiff must begin by proving every material allegation contained in his declaration. If any of the facts of the case on either side have been agreed to be admitted, these admissions are reduced into writing, and signed by the attornies on both sides, and, being read, they supply the place of actual proof. (*a*) The rules of evidence are in general the same in trials upon policies of insurance as in other matters, and there appear to be no cases in the books containing points of evidence peculiarly applicable to trials upon policies of insurance against fire.

Proof of the contract.

The first step on the part of the plaintiff is to prove the contract, which is done by producing the policy, and proving the due execution of it, or the subscriptions, if not under seal. It is not often, however, that offices ever put plaintiffs to the necessity of this proof: the production of the policy, if there be no variance, is conclusive evidence of the contract stated in the declaration; and the general rule is, that no evidence can be received of any parol stipulation or agreement to alter, controul or qualify it. (*b*)

Proof of receipt of the premium.

The receipt of the premium is usually recited in the body of the policy, upon proof of the policy, therefore, proof of that payment is unnecessary, if the loss or damage take place during the period of time which the premium covers.

Proof of interest in the insured.

The insured must also prove his *interest*, for, as we have seen by stat. 14 Geo. 3, c. 48, s. 31, he can only recover to

(*a*) 2 Marsh. 712.

(*b*) Weston v. Emes, 1 Taunt. 115; 1 Marsh. 352; 2 Marsh. 713.

the amount or value of his interest. It appears that a slight interest is sufficient for the purpose of enabling the insured to recover, as that of an agent for the sale of goods, a pawnee or depository for hire, and perhaps a bailee generally.

Compliance with conditions precedent to be proved.

Every material averment in the declaration must be proved; one of the most material is that of the truth of such warranties as constitute conditions precedent; as the delivering in an account of the loss and damage to the office, with evidence in support of it, according to the rules laid down by the respective offices; the construction of the buildings, if the question be raised; and the nature of the property insured.

Proof of the loss.

The accident of fire, which was the cause of the loss or damage, must also be set forth in the declaration, and proved, if not admitted, as it generally is; the loss or damage must be shown; and the loss or damage must appear to have happened during the continuance of the risk.(*a*)

(*a*) As to the commencement and duration of the risk, see ante, ch. 3, sect. 9.

CHAPTER X.

OF THE RECOVERY BACK OF LOSSES IMPROPERLY PAID.

If, after a loss has been paid, the insurers discover that there was fraud in the original contract, or that there were circumstances attending the loss, which, if known at the time the loss was claimed and paid, would have justified their resisting the demand, they may, it appears, maintain an action for money had and received to their use, to recover back the sum improperly demanded and paid; but if at the time they paid the money, they knew, or might upon inquiry have been informed of the grounds upon which they could have resisted the claim, they cannot afterwards recover it back, for this would open a door to infinite litigation. It seems too, as Mr. Serjeant Marshall conceives, (*a*) that if even after the insured has recovered the loss by *process* of *law*, the insurers receive intelligence of *fraud* which they could not possibly have known whilst the suit was depending, they may in that case maintain an action to recover back the money. (*b*) If money be actually *paid*, it cannot be recovered back without proof of *fraud*; but a *promise* to pay, as by an adjustment, is not binding, unless founded on a previous liability. (*c*)

These observations, though applied by the learned serjeant to marine insurances, appear to be equally applicable in principle to insurance against fire.

(*a*) 2 Marsh. 740; Bilbie v. Lumley, 2 East, 469.

(*b*) Emerigon, chap. iv. s. 6.

(*c*) Per Lord Ellenborough, Herbert v. Champion, 1 Campb. 134.

PART II.

LAW OF LIFE INSURANCE.

CHAPTER I.

OF THE NATURE OF THE CONTRACT.

1. *General nature of Life Insurance.*
2. *The different purposes to which Life Insurance may be applied.*
3. *Mode of effecting a Life Insurance.*
4. *The Form of a Policy.*

INSURANCE upon life is a contract, by which the insurers undertake, in consideration of a gross sum paid down, or, as is most usual, of an *annual payment*, to pay the person for whose benefit the insurance is effected, or the personal representatives of the insured, as the case may be, either a stipulated sum, or an annuity, upon the death of the party insured, whenever it may happen, if the insurance be made *for the whole term of life*, or if the insurance be for a *limited period*, in case the death of the insured happens within that period.

Different kinds of life insurance.

It does not appear, nor is it of much importance, when the system of life insurance was first introduced into this country. There is an old case in Vernon (*a*) upon the subject, before the establishment of societies or companies

(*a*) Whittingham v. Thornburgh, 2 Vern. 206; Pre. in Chan. 202, S.C. A. D. 1690.

for the insurance of lives, by which it appears, that such policies were subscribed by individuals in the same manner as marine policies. Insurances upon lives have been held unlawful, and have been even forbidden in foreign countries by positive enactments, as being repugnant to good morals, and opening a door to abuses. In France they were expressly prohibited by an ordinance of 1681. (*a*) It is possible that in a disordered state of society, when, from any defect or weakness in the administration of the law, frauds or acts of violence can be committed with slender chance of detection or punishment, that life insurance might be dangerous, but in a well-ordered and civilized community the benefits of life insurance appear to be very considerable. The modes are numerous in which it may be made applicable to the security and support of individuals, and consequently to the security of the state. The *Amicable* appears to have been the first society of this kind. This corporation obtained a charter in the reign of Queen Anne; but as the benefits of it were confined to a limited number of subscribers, and those only for small sums, several other corporations and companies, upon more extensive plans, have subsequently been established.

In many respects the societies of more recent constitution are preferable to the older, as they have the advantage of a more accurate calculation of the probabilities of human life, by which means they are enabled to offer the insured the same advantages at smaller premiums, and, benefiting by the experience of the earlier institutions, to adopt and modify their operations in such a manner as may best suit the convenience of the assured. Many offices not only give a large share of the profits of the concern to the insured, but apply the share of profit due upon each policy either by *way of bonus or addition* to the sum insured, or *by way of reduction* of the annual premiums, as the holder of the policy may elect. (*b*)

(*a*) Valin on art. 10, tit. des Assurances; see also Le Guidon, c. 16, art. 5, Pothier, tit. des Assurances, p. 127.

(*b*) As the Equitable, the Rock, the Law Life, the Crown, and some others.

The different purposes to which life insurance may be applied.

2. The modes in which life insurance may be applied are numerous. The most obvious is that by which a person secures to his *personal representatives*, to be disposed of in such manner as *he may direct by will*, a sum of money, payable at his death, by the payment of an annual premium, proportioned to his age at the time of effecting the insurance. So a person, possessed of an annual income only, may upon *marriage* secure to the trustees of the settlement, for the benefit of his widow and family, such a sum as it may suit his circumstances to insure. So a creditor, who may entertain doubts about the security of a debt, may protect himself from the loss which may be consequent upon the death of the debtor, by insuring his life either for the whole term of life, or for a limited period. So a tenant holding an estate by lease, renewable upon the dropping of one or more lives on payment of a fine, may, by insuring the life of the survivor of the person upon whose death the fine would be payable, relieve himself from the inconvenience of having to provide for the payment of a large sum at some unexpected period. A person may also insure a sum to be payable on a child attaining the age of twenty-one, or any other period, for the purpose of *advancing him* in the world, or, in the case of a female, for a *marriage portion;* or if he has advanced any large sum of money to a child, he may by insurance secure himself from the loss of it, consequent upon the premature death of the child.

Mode of effecting a life insurance.

The proposal.

3. The usual mode of proceeding to effect an insurance upon a life is as follows:—The party wishing to insure procures at the office a printed form of *proposal*, which is to be filled up by him. This form in general contains the following queries, or to some such purport or effect, the answers to which are to be written upon the adjoining blanks. 1. Name, residence, profession, business or occupation of the person on whose behalf the assurance is proposed. 2. Name, residence, and profession, business or occupation of the person whose life is proposed to be assured. 3. Place and date of birth. 4. Age next birthday.

5. Has the party to be insured resided abroad, and if so, where, and for what period? 6. Is the party employed in military or naval service? 7. Has the party had the small pox or cow pox? 8. Has the party had the gout? 9. Is the party, whose life is to be assured, afflicted with rupture, fits, convulsions, asthma, insanity, or spitting of blood, or any other disorder tending to shorten life, and what? 10. Name and residence of the person's usual medical attendant, to be referred to for information as to present and general state of health. 11. Name of an intimate friend, to be referred to for similar information. 12. Sum to be insured. 13. Term for which the assurance is required. 14. Will the party attend personally at the office after this proposal, filled up, has been sent in?

The office send printed queries to the usual medical attendant and the intimate friend mentioned in the proposal, relative to the habits of life as to temperance, and the state of health of the party to be insured, and these are usually to the following effect.

Inquiries directed to the usual medical attendant and intimate friend.

To the medical man, Whether he is in the habit of seeing the party frequently? Whether he attends him professionally? When he was last ill? What was his indisposition? Whether he has to the knowledge of the medical man been affected with any illness of such a nature as still to influence his general health, or has experienced any wound, hurt, or other accident? Whether he is now in perfect health? Whether he is or has been affected with spitting of blood, asthma, fits, insanity, gout, or rupture? Is he subject to any affection of the head, lungs, heart, or viscera? Is he temperate in his habits of life? *Do you know* of any circumstance in his business or habits of living which may be considered as tending to impair his health or shorten his life?

Knowledge.

Queries much to the same effect are usually sent to the *intimate friend* referred to by the party.

Signing the declaration.

If the answers to these inquiries are satisfactory, the office then proceeds to make out and execute the policy, the party proposing the insurance having first signed a *declaration*

or statement recapitulating the answers to the queries in the printed *proposal* relating to the age of the party to be insured, and the state of his health, and also that he thereby *agrees* that such declaration shall be the *basis* of the *contract* between himself and the company.

This *declaration* is usually recited in the body of the policy; and the policy in a succeeding part provides, that in case any *untrue allegation* be contained in the declaration or statement delivered in to the office of the company on behalf of the said assured, or if it should be proved that the referees have *knowingly* given *false testimonials*. then the policy of insurance shall be void, and all premiums and monies paid thereunder shall be forfeited to the com pany.

The form of a policy.

4. The form of a policy is generally as follows:—It is a deed-poll executed by a certain number of directors of the office, and begins by reciting that the party has proposed to effect an assurance in the sum of upon the life of for the term of life, (or for a shorter term,) and has caused to be delivered to the company the *declaration* (before mentioned) which is shortly recited, and which is stated to be the basis of the contract, that the party has paid the sum of as the consideration for the assurance of the said sum of for a year commencing on day and terminating on day. It is then witnessed that the subscribing directors of the company agree, that in case the assured shall die within the term of a year; or if the said assured shall, in the event of his living beyond the term of a year, pay or cause to be paid during his life the like annual premium of on or before the day of in every subsequent year, the funds and property of the company shall be subject and liable to pay and satisfy to the assurer his executors, administrators, or assigns, within *three* calendar months next after proof shall have been given to the satisfaction of the directors of the said company of the death of the assured, the full sum of together with such further sums (if any) as shall

have been assigned to or in respect of this policy, as or by way of bonus to the sum thereby assured.

The policy usually contains indorsements to the following effect. (*a*) That policies will not be considered to be in force beyond thirty days after the expiration of the year, unless the premium then due shall have been paid to the company, but should proof be given to the satisfaction of the directors that the party or parties whose life or lives have been assured continue in good health, the policies may be revived at any period within six months, on the payment of a specified fine, to be fixed by the directors, or even within a longer period, as twelve or thirteen months, on the payment of such a fine as the directors may think reasonable.

Restrictions are made as to going beyond the limits of Europe, except under specified circumstances. That assurances made by persons on *their own lives* will become void if they die *by duelling*, *by their own hands*, or *by the hands of justice*. The directors, however, may in such cases make such allowances as they may think reasonable.

Stamp duties.

By stat. 55 Geo. 3, c. 184, sched. tit. Policy, a policy of insurance, or other instrument, by whatever name the same shall be called, whereby any insurance shall be made upon any life or lives, or upon any event or contingency relating to or depending upon any life or lives, when the sum insured shall not amount to 500*l.* is subjected to a stamp duty of 1*l.*; where it amounts to 500*l.* and not to 1000*l.* to 2*l.*; where it shall amount to 1000*l.* and not to 3000*l.* to 3*l.*; where it shall amount to 3000*l.* and not to 5000*l.* to 4*l.*; and where it shall amount to 5000*l.* or upwards, to 5*l.*

Death by the hands of justice vitiates a policy even where there is not a provision to that effect in a policy.

It appears that in policies effected by the Amicable Society, there is no exception as to *death by the hands of justice;* and the question arose, whether, where a person insured his life in that office, and afterwards suffered death by the hands of justice, the policy was thereby avoided. The Master of the Rolls (Sir John Leach) held,

(*a*) See the policy of the Crown Life Assurance Company in the Appendix.

that it was not avoided; but afterwards upon appeal to the House of Lords, that decision was reversed, it being considered contrary to the policy of the law, and as holding out an encouragement to the commission of crime, that the representatives of a party should be enabled to recover upon a policy in case of a death consequent upon the party's own act.

By a policy of insurance, (*a*) which, on the 11th of January, 1815, H. Fauntleroy effected on his life with the Amicable Society, it was witnessed, that he, Fauntleroy, was admitted a member of the society; and the corporation bound themselves and their successors to pay to his executors, administrators, or assigns, such a proportion of the joint stock or fund as on his death should become due, according to the society's charter and bye-laws. In October, 1824, Fauntleroy was declared a bankrupt, shortly after he was convicted of forgery, and on the 20th of November he was executed, pursuant to his sentence. The premiums had been duly paid up to the time of his death. By the sixth bye-law the policy was to be vitiated in certain cases therein mentioned, which are common to most insurance offices, but the case above mentioned of *dying by the hands of justice*, by their own hands, or by duelling, was not mentioned. The bill was filed by the assignees of Fauntleroy, praying, that an assignment of the policy, which had been made in 1819, might be declared to be void, and that the Amicable Society might be decreed to pay to the plaintiffs what was due on the insurance. The question argued was between the plaintiff and the Amicable Society, who contended that because Fauntleroy had perished by the hands of justice, no person could make any claim against them under the policy of insurance.

The Master of the Rolls.—" When the policy does not provide that the obligation to pay shall determine, if the event insured against shall happen in a certain specified

(*a*) Bolland v. Disney, 3 Russ. 351 ; 4 Bligh, 194, N. S.

manner, then if the event do happen in that manner, the obligation to pay shall not determine merely because the conduct of the party insured produced the event, even though such conduct was an offence against the criminal law of the country. To avoid the obligation to pay, the act of the party insured, which produced the event, must be done fraudulently, for the very purpose of producing the event. Decree for the plaintiff."

This decision was afterwards reversed upon appeal to the House of Lords.(*a*)

(*a*) 4 Bligh, 194, new series.

CHAPTER II.

OF THE WARRANTY OF THE AGE AND HEALTH OF THE PARTY TO BE INSURED, AND OF MISREPRESENTATION AND CONCEALMENT.

1. *Warranty to be strictly true.*
2. *As to the Clause that the Party to be insured "is in good Health at the time of making the Policy."*
3. *As to the Clause that the Party to be insured has "no Disease tending to shorten Life."*
4. *Concealment of material Facts.*
5. *Reference to the "usual Medical Attendant" of the Party to be insured.*

The declaration, when forming part of the policy, is a warranty, and must be strictly true.

1. This *declaration* (when forming a part of the policy) amounts to a *condition* or *warranty*, which, as before observed, must be *strictly* true, or complied with (*a*), and upon the truth of which, whether a mistatement be intentional or not, the whole contract depends; the party effecting an insurance, therefore, cannot be too cautious in ascertaining the real state of the facts alleged in this declaration. The offices in general never avail themselves of any trifling objection to resist payment upon a policy unless *fraud* appears, and therefore, as in the case of a trifling difference of age of the party insured from that stated in the declaration, although there can be no doubt that an office might successfully resist a claim upon that ground, yet they usually content themselves with deducting such a sum of money from the sum insured for, as would compensate the office for the additional premiums, with

(*a*) On warranty, see ante, p. 27.

interest, which ought to have been paid, if the age had been accurately stated.

A clause in the warranty, that the person whose life is to be insured is in good health at the time of making the policy.

2. A warranty that the person, whose life is to be insured, "is in good health at the time of making the policy," is to be construed in a liberal sense as regards the assured, and is not to be understood as a warranty, that the person is perfectly free from the seeds of disorder. Though the person may, by accident, be afflicted with a particular infirmity, if his life be in fact a good one, and he be in a reasonably good state of health, so that his life may be insured on the common terms for a person of his age and condition, the party insuring will have a right to recover.

An insurance was effected on the life of Sir J. Ross (*a*) for one year, from October, 1759, to October, 1760, *warranted in good health at the time of making the policy.* In an action on this policy it appeared that Sir James had received a wound in his loins in battle in the year 1747, which had occasioned a partial relaxation or palsy, so that he could not retain his urine or fæces, and which was *not mentioned* to the insurer. He died of a *malignant fever* within the time of the insurance. All the physicians and surgeons, who were examined for the plaintiff, swore that the wound had no sort of connection with the fever; that the want of retention was not a disorder which shortened life; and that he might, notwithstanding that, have lived to the common age of man; and the surgeons who opened him said that his intestines were all sound. One physician, who was examined for the defendant, said, that want of retention was paralytic, but being asked to explain, said it was only a local palsy arising from the wound, but did not affect life, but upon the whole he did not look upon him as a good life. Lord Mansfield told the jury "no question of fraud can exist in this case. When a man makes an insurance upon a life generally, without any warranty of the state of the life insured, the insurers take all the risk, unless some fraud be committed by the person insuring, either

(*a*) Ross *v.* Bradshaw, 1 Bla. 312; 2 Marsh. 773; 2 Parke, 749, 7th ed.

by *suppressing some circumstances which he knew*, or by *alleging what was false*. But if the party insured knew no more than the insurer, the latter takes the risk. Wherever there is a *warranty*, it must *at all events* be proved that the *party was a good life*, which makes the question on a warranty much larger than on fraud. Here there was a warranty, and it is proved that there was no representation at all as to the state of the life, nor any question asked about it, nor was it necessary. When an insurance is upon a *representation*, every material circumstance should be mentioned; such as age, way of life, &c. But where there is a warranty, then nothing need be told; but it must in general be proved, if litigated, *that the life was in fact a good one;* and *so it may be, though he had a particular infirmity*. The only question is, whether *he was in a reasonably good state of health, and such a life* as *ought to be insured on the common terms*. The jury, without going out of Court, found a verdict for the plaintiff.

It may be observed, that this is a case of a nature not very likely to occur again, as it appears to have been effected by a private insurer upon a very loosely drawn policy. The warranties in policies, as now delivered by the offices, are of a much more specific nature than that contained in a preceding case. It is now in general inquired whether the party to be insured has had certain disorders, which, if undergone, his life becomes the better, as being the less exposed to them, as the small pox, or its antidote the cow pox; secondly, whether he has had the gout, a fact which, if answered in the affirmative, must render the life the worse, it being a disorder which generally recurs; thirdly, it is inquired whether he is afflicted with certain specific disorders, which, though not in themselves immediately fatal, or so dangerous as gout, have a tendency gradually to undermine the constitution, or render the life worse; and there is also a general question, as to any other disorder not specified, with which the party may be afflicted —that question, however, does not apply to any trifling disorder, which the most healthy may occasionally be afflicted

with, but as is generally expressed in the declaration signed by the party effecting the insurance—any disorder *tending to shorten life,* and the warranty is drawn up according to the answer. If it were always open to the insurers to avoid a policy by proof of the bare proposition that a party was *not* a *good life* at the time of effecting a policy, few policies could stand; as although a party may be free from every specific disorder, yet he may be of plethoric habit, or consumptive, or of a naturally delicate constitution, from causes not ascertained, or of a short-lived family, which latter fact has been considered by the offices of some importance, as affording a prognostic of the future duration of the life of a member of such a family. (*a*)

There is a case of much the same kind as the preceding, and in which the warranty is of an equally general nature, but which it is proper to mention, as any observations of such a judge as Lord Mansfield upon the subject are worthy of notice. An insurance (*b*) was made on the life of Sir Simeon Stuart, from the 1st of April, 1779, to the 1st of April, 1780, and during the life of Eliza Edgely Ewer. The policy contained a warranty that Sir Simeon was about 57 years of age, *and in good health* when the policy was underwritten, and that Mrs. Ewer was about 78 years of age. It appeared that though Sir Simeon was troubled with spasms and cramps from violent fits of the gout, that he was in as good a state of health when that policy was underwritten, as he had enjoyed for a long time before. It was also proved by the broker who effected the policy, that the underwriters *were told* that Sir Simeon *was subject to the gout.* Doctor Heberden and other medical men proved that the spasms and convulsions were symptoms incident to the gout. Lord Mansfield said—The imperfection of language is such, that we have not words for every different idea, and the real intention of the parties must be found out by the subject-matter. By the present policy, the life is warranted to some of the underwriters, *in health;* to others, in *good health:* and yet there was no difference in

(*a*) See Watson v. Mainwaring, 4 Taunt. 464, post, 110.

(*b*) Willis *v.* Poole, 2 Parke, 650, 7th ed.; 2 Marsh. 774.

point of fact. Such a warranty can never mean that a man has not in him the *seeds* of *some disorder*. We are all born with the seeds of mortality in us. A *man subject to the gout*, is *a life capable of being insured* (*a*), if he has no sickness at the time to make it an unequal contract—verdict for the plaintiff.

Where there is no warranty, the insurers run the risk of its being a good life, unless there be fraud.

It would appear that where there is no warranty, the insurers run the risk of its being a good life or not, unless there is fraud by concealment of a material fact, or an untrue allegation of a material fact.

An insurance was made (*b*) on the life of Drury Sheppy, from the 1st of April, 1777, to the 1st of April, 1778. The interest in the life was a debt of 900*l.* due from Sheppy to the plaintiff. In an action on the policy, it appeared that Sheppy had a place in the Custom House of Ireland, went to the south of France for the benefit of his health, or to avoid his creditors, and there died within the time limited in the policy. The broker who effected the policy told the underwriters that the gentleman, for whom he acted, would not warrant any thing; but *from the account he* (the broker) *had received, he believed it to be a good life.* Lord Mansfield said, "as to the interest, this policy may be considered as a collateral security for the debt due to the plaintiff. When there is no warranty the underwriter runs the risk of its being a good life or not. If there be a concealment of any knowledge of the state of the life, it is a fraud. It is a rule that every subsequent underwriter may give credit to the representation made to the first (*c*), and it is allowed that any subsequent underwriter may give in evidence a misrepresentation to the first. The broker here does not pretend to any knowledge of his own but speaks from information. There is no fraud in him." The jury found a verdict for the plaintiff.

This case is also of a special nature, which, for the reasons before given, is not likely to occur again.

(*a*) The offices, when they accept a life subject to gout, usually indemnify themselves by an increased rate of premium.

(*b*) Stackpole v. Simon, 2 Parke, 648, 7th ed; 2 Marsh. 775.

(*c*) Watson v. Mainwaring, 4 Taunt. 763, post, 110.

"Disorders tending to shorten life" within the meaning of the declaration.

3. If a person be afflicted with a disorder at the time of effecting an insurance, of which he afterwards dies, it is not to be concluded that this is a disorder within the clause of a warranty "relating to disorders tending to shorten life," unless it be a disorder which has in general that tendency.

An action (*a*) was brought by the executors of Dr. Watson, deceased, against the Equitable Assurance Office, to recover a sum which had been insured on his life. Upon the trial of the cause, at the sittings after Hilary term, 1813, before Gibbs, C. J., the office resisted the demand, on the ground that when the policy was effected the deceased had (in breach of his declaration to the contrary) a disorder tending to shorten life, and that the policy was therefore void. For the plaintiff it was proved, by an eminent physician at Bath, to whom Dr. Watson had applied for advice, that his disorder was an *affection of the bowels;* that this disease may proceed from either of two causes, the one a defect of some of the internal organs, the other a mere dyspepsia; that the first would tend to shorten life, that the second, though it renders the patient uncomfortable, does not generally, unless it increases to an excessive degree, tend to shorten life; and that the disease with which Dr. Watson was afflicted was not the organic dyspepsia. Several other medical men stated, that they had attended Dr. Watson since the policy had been effected, and that he was then quite free from the disorder. On the other hand, several medical men stated, as witnesses for the defendants, that they had seen him at the time of his visiting Bath, previously to effecting the insurance, and that they then considered him as a falling man. It was left to the jury whether the patient's complaint was the *organic dyspepsia*, and, if it was not, whether the *dyspepsia* under which he laboured was, at the time of effecting the policy, of such a degree that *by its excess it tended to shorten life.* The jury found that it was neither *organic* nor *excessive.* Verdict for the plaintiff. It was afterwards moved to set

(*a*) Watson v. Mainwaring, 4 Taunt. 763.

aside the verdict and to have a new trial, on the ground that since the assured afterwards died of the same disorder which he had before effecting the policy, that circumstance was conclusive proof that he was then afflicted with a disorder tending to shorten life.

Chambre, J.—"All disorders have, more or less, a tendency to shorten life, even the most trifling,—corns may end in mortification. That is not the meaning of the clause, if dyspepsia were a disorder that tended to shorten life within this exemption, the lives of half the members of the profession of the law would be uninsurable."

Gibbs, C. J.—"According to the rule contended for, the assured, to be insurable, must have no disease at all. It cannot be said that this was not a case, if ever there was one, fit to be left to a jury; and though the office had very good grounds to try the cause, since it has been fairly submitted to a jury, there is as little ground for the Court to interfere as in any case that ever was tried."—Rule refused.

Concealment of material facts.

4. It is the duty of the assured to disclose all *material* facts within their knowledge, and the *materiality* does not depend upon the opinion of the assured but upon the opinion of a jury as a question of fact. Athough specific questions applicable to all men are proposed by the offices, yet there may be particular circumstances affecting the individual to be insured, which are not likely to be known to the insurers, and the concealment of a material fact, where a general question is put by the insurers at the time of effecting the policy, which should elicit that fact, will vitiate the policy. (*a*)

An action of assumpsit (*b*) was brought against the secretary of the Atlas Insurance Company on a policy of insurance on the life of the Duke of Saxe Gotha. Plea, the general issue. At the trial before Lord Tenterden, C. J., it appeared that, in 1824, an insurance was effected on the life of the duke with the Union Assurance Company. That

(*a*) See upon Concealment, ante, p. 38.

(*b*) Lindenau v. Desborough, 8 Barn. and Cress. 586.

company had an agent in Germany, who, on behalf of his principals, submitted certain questions to the physicians of the duke, many of them as to specific diseases and his habits of life; and the last was, "Is there any other circumstance within your knowledge which the directors ought to be acquainted with?" And this was answered in the negative. There was also a private certificate, sent by the agent to the directors, in answer to their inquiries as to certain points. In this also there was a general question, "Do you know any other circumstance which ought to be communicated to the directors?" which was answered as follows:—"Agreeably to our informations, the duke has led a dissolute life in former days, by which he has lost the use of his speech, and, according to some informations, also that of his mental faculties, which however is contradicted by the medical men; and as little as we believe that this has any influence on his natural life, we find it our duty to mention it." The physicians, in one of their answers, said the duke was *hindered* in his speech, but did not mention the state of his mental faculties. An application was made to the Union to insure a further sum on the duke's life; but that being contrary to their general rules, their agent handed over the proposal to the Atlas, and at the same time gave the latter company the private answers received from their agent in Germany. The plaintiff signed the usual *declaration*, and declarations by the duke's physicians were made to the Atlas similar to those made to the Union. Upon receiving these documents the Atlas entered into the policy. In 1825 the duke died, and it was then discovered that there had existed in his head for many years a large tumour pressing on the brain, to which the loss of speech and mental faculties might be attributed. But all the medical testimony went to establish that the symptoms, during the duke's life, were not such as were likely to excite the suspicion that such a tumour existed, or that he was afflicted with any particular disorder tending to shorten life. One foreign physician however said, that, had he been consulted, he should have thought it right to

state, that he attributed the loss of speech to a paralysis of the organs of speech. And an English surgeon, called for the plaintiff, on cross-examination, said he should, in answer to the general question, "whether he knew any other circumstances that ought to be communicated to the directors?" have thought it right to mention the state of the duke's mental faculties. Upon hearing this evidence, Lord Tenterden told the plaintiff's counsel he thought it made an end of his case; and he should leave it to the jury to say whether there were any facts material to be known which were not mentioned to the assurers, and that if there were the policy was void. The plaintiff's counsel thereupon elected to be nonsuited, leave being given to move for a new trial on the ground of misdirection. It was afterwards moved accordingly.

Lord Tenterden, C. J.—"At the trial before me, amongst other depositions, that of a foreign physician named Stark was read, wherein he stated that he would have certified that the duke was in bodily health, but that he could not have failed to observe that he laboured under an inability to speak, which he attributed to a paralytic state of the nerves of the organs of speech. In addition to this, Mr. Green, a surgeon, stated, that if consulted he should have thought it right to mention the state of the duke's mental faculties, whereupon I expressed an opinion that the cause was at an end, and said that I should direct the jury to find for the defendant, if they thought the plaintiff had failed to communicate to the insurers any material circumstances within his knowledge. The only question now is, whether that direction would have been correct or not? At the time of the trial I had in my recollection, although not very accurately, the case of Morrison v. Muspratt, (*a*) which was tried before me at Lincoln. In the present case, the insurance was upon the life of a foreigner. It appeared that a previous insurance had been effected with an office that had an agent abroad. That office was requested to

(*a*) 4 Bing. 60, post, p. 117.

make a further insurance, and, being unwilling to do so, the secretary handed over to the defendant the certificate received from the foreign agent. If that had distinctly disclosed the fact now in question, I am not prepared to say that the defendants would have had any ground of complaint; but the state of the duke's faculties is not distinctly stated in the certificate. Then, it is said, that the party is not bound to do more than answer the questions proposed, unless he can be charged with some fraudulent concealment. Admitting this not to fall within any of the specific questions, which is not by any means clear, still the general question put by the office requires information of every fact which any reasonable man could think material. It certainly appears to me, that the circumstances proved as to the state of the Duke of Saxe Gotha's mental faculties were material, and upon the authority of the case of Morrison v. Muspratt, and Bufe v. Turner, (*a*) I think I should not have done wrong in leaving the case to the jury in the manner proposed at the trial."

The general question put by the offices may require information of every fact which any reasonable man could think material.

Bayley, J.—" I think that in all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured; and that the proper question is, ' whether any particular circumstance was, in fact, material?' and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would be extremely difficult to show that the party neglecting to give the information thought it material. But if it be held that all material facts must be disclosed, it will be the interest of the assured to make a full and fair disclosure of all the information within their reach. Besides the cases already mentioned, there are others establishing that the concealment of a material fact, although not fraudulent, is sufficient to vitiate a policy on a ship. On these grounds and authorities, I am of opinion that the proper question to the jury was not whether the

(*a*) 6 Taunt. 338, ante, p. 40.

party believed the information withheld to be material, but whether it was in fact material."

Littledale, J.—" I am of the same opinion. It is the duty of the assured, in all cases, to disclose all material facts within their knowledge. In cases of life insurance, certain specific questions are proposed as to points affecting in general all mankind. But there may be also circumstances affecting particular individuals which are not likely to be known to the assurers, and which, had they been known, would no doubt have been made the subject of specific inquiries. The general question appears to have been proposed in order to meet such cases, and I think the question on such a policy is not whether a certain individual thought a particular fact material, but whether it was, in truth, material, and of that the jury are by law the judges. The nonsuit ought not to be disturbed."—Rule refused.

As observed by Lord Tenterden, it seems very questionable whether the infirmity of the insured did not fall within the specific questions put by the office; and it seems clear, if to the general question, ' whether there be any other circumstance within your knowledge which the directors ought to be acquainted with?' an answer in the negative be given, and the result be as usual embodied in the policy so as to constitute a *warranty*, that the finding of the jury, that a material fact was not disclosed, whether fraudulently intended or not, must at once put an end to the case upon the ground of the warranty. But even upon the common doctrine of *concealment* in insurance cases, although no specific question be asked, the suppression of a material fact, although, as we have already seen, innocently done, will be in contemplation of law a fraud, and vitiate the contract.

Whether the fact that a single woman has had a child be a material fact.

The circumstance that a single woman has *had a child* two or three years before the insurance upon her life was effected, with the knowledge of the party effecting it, *may be*, under circumstances, *a material fact*, which he ought not to conceal.

An action was brought(*a*) against the defendants, as directors of the Globe, upon a policy of insurance effected upon the life of a Miss S., dated the 10th of September, 1828, for seven years. In March, 1829, Miss S. died. The usual declaration had been made and was recited in the policy, " that the person insured was not afflicted with gout, &c. or any disease tending to shorten life."

It appeared that at Christmas, 1827, she was in a fair state of health. In September, 1828, she was in general good health, except that she complained of little pains in the head. She was a pale and weakly looking person. In February, 1828, she had been bled and leeched for a supposed determination of blood to the head, but appeared subsequently, and shortly previous to her last illness, to be healthy.

Upon a *post mortem* examination, it was the opinion of the medical men, that there was nothing which they would call unhealthy about the stomach or head, or any thing elsewhere which would lead them to suppose that she was affected with any disease likely to shorten life. It turned out that in 1825 she had *a child.* A physician, who was examined, stated that that fact could not have accelerated her death, and that he should not think it necessary for an office to inquire if a female had had a child; but that he being aware of the fact, and being applied to by an office, should think it *material* to state it. Some letters from Miss Simpson to a schoolfellow were written shortly before and after the insurance was effected, detailing the state of her health, which she considered very bad, and stating, in one of them, " that her health was entirely gone, and her constitution quite undermined."

The Chief Justice interposed, and asked the counsel for the plaintiff if he thought he could get over the declarations in these letters, and also the fact of Mr. H. Edwards (the party effecting the insurance) concealing the circum-

(*a*) Edwards v. Barrow and others, M. S. C. P., April 23, 1830.

stance of Miss S. having had a child, of which he was aware?—A nonsuit was accordingly submitted to.

If the nonsuit had proceeded upon the fact of the *birth* of the child alone, it certainly would appear extraordinary, because as it is understood that the offices make no difference in premium between a married and a single woman, it is difficult to see how such a circumstance, which had happened two or three years previously, could be *material*, unless it be taken as affording a ground of probability that the female to whom it has occurred, might gradually degenerate into an immoral course, which may tend to shorten life. It however afterwards appeared, that the child was born under circumstances of extraordinary disease and moral turpitude on the part of the parents.

Although the party to be insured produce a satisfactory medical certificate from a medical man, yet if another medical man has attended within a short period previous to the effecting the insurance, it appears to be a *material* fact, or, at all events, one which should be submitted to the notice of the jury in an action on the policy.

Although the party to be insured produce a satisfactory medical certificate, the fact that another medical man has attended within a short period, appears to be a material fact.

An action was brought(*a*) on a policy of insurance, executed by the defendants, on the life of a Mrs. Elgie.

At the trial before Abbott, C. J., it appeared, that for some years previous to December, 1822, Mrs. Elgie had been in a delicate state of health, exhibiting, particularly in the year 1821, symptoms which were thought to be phthisical; and having been, in October, 1822, twice alarmingly ill, in December, 1822, Mr. Boot, a medical practitioner, who resided some miles off, and was not then in attendance upon her, but who had known her for many years, was sent for to examine her, with a view to the present insurance. He examined particularly the state of her lungs and liver, and finding them as he thought sound, certified to the defendants that the ordinary state of her health was good. On the 19th of March following, he gave another certificate to the same effect, upon which the insurance was effected in April, 1823. Mrs. Elgie died of

(*a*) Morrison v. Muspratt, 4 Bing. 61.

diseased lungs in April, 1824. Between December, 1822, and the 19th of March, 1823, she was attended by Mr. Bland, a medical practitioner, who resided in her neighbourhood. She had a troublesome cough, and became much emaciated; her diet was regulated with a view to add to her strength, without increasing febrile symptoms and irritation, to which she was then subject in the evening; but Mr. Bland thought that disease of structure had not taken place. When the insurance was effected, no communication was made of this illness or of the attendance of Mr. Bland.

The Chief Justice left it to the jury generally to say, whether any misrepresentation had been made to the defendants, but did not expressly call on them to consider whether the illness in January and February, 1823, and the attendance of Mr. Bland, ought to have been communicated before the insurance was effected. Verdict for the plaintiff.

A rule nisi was afterwards obtained for a new trial, on the ground that there had not been so full a disclosure to the defendants of Mrs. Elgie's situation as they were entitled to receive. On showing cause it was contended, that all which it was material for the defendants to know was the condition of the life at the time of the insurance, and that there was no evidence to show that Mrs. Elgie was not in good health on the 19th of March and the 23d of April. Provided her health was re-established at the time of insurance, the knowledge of her previous condition could be of no importance to the defendants.

Best, C. J.—" Whether or not it was material for the defendants to have been made acquainted with the fact which has been withheld from their knowledge, is a question for the jury. It is probable, however, it would be esteemed material, because all insurance offices are desirous to consult with the medical man who has been last in attendance on the life insured. I think, therefore, there should be a new trial on payment of costs, as the attend-

ance of Bland on Mrs. Elgie was not disclosed to the insurers."

Burrough, J.—"The attendance of Bland on Mrs. Elgie ought to have been brought to the attention of the jury, to decide whether or not it ought to have been disclosed to the defendants."

Gaselee, J.—"If the defendants in the present case had known of the attendance of a medical man from January to March before they signed the policy, it is probable they would have paused or altered their terms. The jury, therefore, ought to have considered the materiality of that evidence." Rule absolute.

In a case where the conditions of insurance required the usual declaration of the state of health of the assured, and the policy was to be valid only *if the statement were free from all misrepresentation and reservation*, and the declaration described the party assured as resident at a particular place, at a time when she was in fact a prisoner in the gaol there; it was held to be a question for the jury, whether the imprisonment was a material fact and ought to have been communicated, although there was no condition which required the fact of imprisonment to be expressly stated. (*a*)

The fact that a party to be insured described as resident in a place, but in truth a prisoner in the gaol, is material.

5. It is very important that the party to be insured give a proper reference to his *usual medical* attendant, according to the terms of the question submitted, otherwise the policy will be vitiated: and even where a party insures *upon the life of another*, the former is bound by the misrepresentations of the latter, the party to be insured being considered in the light of an *agent* of the party insuring.

The party to be insured must give a reference to the usual medical attendant.

A party insuring upon the life of another, is bound by the misrepresentation of the latter. The latter is to be taken as the agent of the former.

An action (*b*) was brought by the plaintiff to recover from the defendants, directors of the Atlas, the sum of 1000*l.* upon a policy effected by him on the life of a person named Howes. Howes had formerly resided at Warminster, and

(*a*) Huguenin v. Bayley, 6 Taunt. 186.

(*b*) Everett v. Desborough, 5 Bing. 503. See also Maynard v. Rhodes, 5 D. & Ry. 266.

afterwards went to reside at Bath. Whilst living at the former place he was sober and temperate in his habits, and was to all appearance a man enjoying a good bodily state of health: whilst at the latter place he gave himself up to habits of intoxication, and ultimately died of a fit of apoplexy. Upon the occasion of the plaintiff's insuring Howes's life, the directors of the Atlas, through their agent, presented the plaintiff with a paper containing questions touching the health of the person to be insured, and which were most material to be answered. Amongst others, there was one requiring the name of the medical man who *usually and of late* attended the party whose life was to be insured, in order that he might be referred to. The plaintiff accordingly inquired of Howes who was his usual medical attendant, and who had been attending last. Upon which he referred to a Dr. Vicary, of Warminster. However, it turned out on the evidence that Vicary *had not attended Howes for nearly twenty years.* Upon this misrepresentation of Howes, the question was raised, whether it did not vitiate the policy, although unknown to the plaintiff. A nominal verdict was taken for the plaintiff, with leave to the defendants to move to enter a nonsuit.

On showing cause against the rule which had previously been obtained, it was admitted, that it was a rule of law that in cases of this kind, if the party insuring the life of another practised any concealment or deceit on the underwriters, with regard to any material fact concerning the life to be insured, that upon proof of that fact the policy was vitiated; but that in this case, if any deceit or concealment was practised, it was practised by Howes, whose life was insured, and not by the plaintiff, who was ignorant that any misrepresentation was made by Howes.

On the other side it was contended, that the plaintiff in this case must be treated as *principal,* and the party whose life was insured as the *agent,* for to what better authority could he go to obtain information necessary to answer the questions put to him than to Howes himself? He acted upon these representations of Howes, who appeared to be

his agent, and he therefore should be held liable as the principal for the acts of the agent. The Court adopted the latter argument, and thought, that from all the circumstances, Howes should be considered as the agent of the plaintiff, who, acting upon his representations, should therefore be answerable for the acts of his agent. Rule for the nonsuit made absolute.

A party insuring is also bound by the concealment of a disorder by the party insured.

So where a party effected an insurance on the life of another, who at the time of examination *concealed* a disorder, of which he subsequently died, it was held, that the plaintiff was bound by the breach of the conditions on which the policy was effected, although not privy to the falsehood.(*a*)

(*a*) Maynard v. Rhodes, 5 D. & R. 266; 1 Carr. 360.

CHAPTER III.

OF THE INTEREST IN THE LIFE INSURED.

1. *General Principles.*
2. *Interest of Creditor in the Life of a Debtor.*
3. *Interest of Trustee in Life of cestui que trust.*
4. *Debtor or Grantor of Annuity Insuring.*

Besides the most obvious and ordinary mode of insurance, that of a person insuring his own life in a sum payable to his personal representatives, much of the business of the offices consists of nominee insurances, that is, where a person insures the life of another. As life insurance became more generally extended, it appears, that like many other beneficial practices, it became subject to abuse. Persons were in the habit of insuring the lives of others with whom they had no connection, and in whom they had no interest, merely by way of gambling speculations, and it requires no very great discernment to see that such a practice was pregnant with serious mischief, and held out dangerous temptations on the one hand to unprincipled speculators, and imminent danger to the unfortunate persons who might happen to be selected by them as subjects of insurance. The legislature became so convinced of the evil, that the practice of life insurance has since been regulated by act of parliament, whereby these insurances without interest are considered void.

Insurances without interest void.

By the stat. 14 Geo. 3, c. 48, s. 1, it is enacted, that no insurance shall be made by any person or persons, bodies politic or corporate, on the *life or lives* of any person or persons, or *any other event or events whatsoever*, wherein the person or persons for whose use or benefit, or on whose account, such policy or policies shall be made, *shall*

have no interest, or *by way of gaming or wagering:* and that every insurance made contrary to the true intent and meaning of this act, shall be null and void to all intents and purposes whatsoever.

And that it shall not be lawful to make any policy or policies on the life or lives of any person or persons or other event or events, without inserting in such policy or policies the name or names of the person or persons interested therein, or for whose use or benefit, or on whose account, such policy is so made or underwrote. S. 2.

That in all cases where the insured hath an interest in such life or lives, event or events, *no greater sum shall be recovered or received* from the insurer or insurers than the *amount* or *value* of the interest of the insured in such life or lives or other event or events. S. 3.

The fourth section contains a provision that the act shall not extend to insurances bonâ fide made on ships or goods.

Very few questions have arisen upon the subject of interest, because the offices are never in the habit of taking that objection, unless they are under the necessity of resisting payment upon some other fair and proper ground, as fraudulent misrepresentation or concealment; and if they are driven to resist on such a ground, they then, in order to make their case the stronger, sometimes also object to the want of interest, when the policy is open to the objection. The offices are, in fact, constantly in the habit of taking insurances where the interest is upon a contingency which may very shortly be determined, and if the parties choose to continue the policy bonâ fide after the interest ceases, they never meet with any difficulty in recovering: so also they frequently grant policies upon interests of so slender and precarious a kind, that although it may be difficult to deny some kind of interest, it is such as a court of law would scarcely recognise. (*a*) This practice of the offices,

(*a*) The author has seen a policy effected by a mother upon a son's life, the interest being no other than that he lived with her, and contributed largely to the expenses of housekeeping. So upon the life of a creditor who forbore to call in the debt, but which was likely to be called in by his personal representatives at his death.

of paying upon policies, without raising questions as to interest, is so general, that it has been even recognised in courts of law. As where a person bought a policy of insurance of another after the interest had expired, or was on the point of expiring, and, some years after the sale and assignment, the executor of the purchaser, understanding that the office was not in law bound to pay upon the policy, brought an action against the seller to recover back the purchase-money. But Lord Tenterden, C. J. told the jury, that the only point for their consideration was, whether, at the time of the sale, there was any misrepresentation or concealment to vitiate the policy. It was true in point of law that the insurance ceased with the interest, but then they had it in evidence that the insurers never availed themselves of that objection. (*a*) Verdict for defendant.

A creditor has an insurable interest in the life of his debtor.

2. A bonâ fide creditor has undoubtedly an interest in the life of his debtor, at least where he has only the personal security of the debtor, and this interest is insurable within the statute.

An insurance was effected on the life of Lord Newhaven from the 1st of December, 1792, to the 1st of December, 1793. In an action on the policy, the only question was as to the plaintiff's interest in the life insured, which, it was contended, was not sufficient to take this case out of the above statute. It appeared that Lord Newhaven was indebted to the plaintiff and a Mr. Mitchell in a large sum of money, part of which debt had been assigned by them to another person, the remainder, being more than the amount of the sum insured, was, upon a settlement of accounts between the plaintiff and Mitchell, agreed by them to remain to the account of Mitchell only. Lord Kenyon was of opinion that this debt was a sufficient interest. He said, "It was singular that this question had never been directly decided before; that a creditor had certainly an interest in the life of his debtor, because the means by which he was to be satisfied might materially depend upon it; and that,

(*a*) Barber v. Morris, K. B. Feb. 19, 1831, MS.; 2 Moody & Malk. 62. A new trial was afterwards moved for, and refused.

at all events, the death must in all cases, in some degree, lessen the security. The jury found a verdict for the plaintiff. (*a*)

It may be observed, that this note is very short and not very satisfactory; because, if the plaintiff had in fact assigned over his interest in the debt to Mitchell before the death of the assured, it is difficult to see how any insurable interest, within the statute, remained in him, unless we assume that the debt still remained legally due, and recoverable by the plaintiff from Lord Newhaven, the latter having no notice of the assignment of the debt in such settlement of accounts, or, upon the principle of Tidswell v. Angerstein, post, we consider the plaintiff to be in the situation of a trustee. If a debt is amply secured by mortgage or otherwise, it would be very difficult to establish such an interest as would entitle the party insuring to recover, because the above act declares that "no greater sum shall be recovered from the insurer than the amount or value of the interest of the insured in the life insured;" perhaps a case of this kind is not likely to occur in practice, as it is not usual to insure by way of collateral security, except when the principal security is doubtful.

If the debt be in any manner paid, even after the death of the party insured, the creditor has no longer an interest upon which he can recover.

Although a creditor may insure the life of the debtor, yet if, after the death of the debtor whose life is insured, and before any action be brought on the policy, the debt be paid, the creditor is not entitled to recover.

The plaintiffs in this action (*b*) were coachmakers in Long Acre, and on the 29th of November, 1803, they effected an insurance on the life of the late Right Hon. William Pitt for 500*l.* for seven years, at an annual premium of 15*l.* 15*s.* In an action on the policy the plaintiffs averred, that "at the time of making the insurance, and from thence until the death of Mr. Pitt, they were interested in his life to the amount of the sum insured." It appeared that Mr. Pitt, at the time of the execution of the policy and from thence to the time of his death, was indebted to

(*a*) Anderson v. Edie, N. P. B. R. 1795; 2 Park, 640, 7th ed.

(*b*) Godsal and others v. Boldero, 9 East, 72.

the plaintiffs in more than 500*l.*, and died insolvent; and that after his death, and before the commencement of the suit, the executors of Mr. Pitt paid to the plaintiffs, out of the money granted by parliament for the discharge of his debts, 1109*l.* 11*s.* 6*d.* in full for the debt due to them from Mr. Pitt. The Court determined that the plaintiffs were not entitled to recover. They held that this insurance, like every other to which the law gives effect, is in its nature a contract of *indemnity*, as distinguished from a wager; that the interest which the plaintiffs had in the life of Mr. Pitt was that of creditors, in a case where the probability of payment depended on the continuance of his life, and the indemnity sought by the insurance was against the loss which might result from his death; that the action was therefore founded on a supposed damnification of the plaintiff, occasioned by his death, and *existing at the time of the action brought;* and consequently, if, before the action brought, the damages occasioned by his death were prevented by payment of his debt, the ground of action was taken away; (*a*) that it was no objection to this answer that the fund, out of which their debt was paid, did not (as was the case in the present instance) originally belong to the executors, as a part of the assets of the deceased; for though it was derived to them *aliunde*, the debt of the testator was equally satisfied by them thereout; and the damnification of the creditors, in respect of which their action upon the insurance contract could be alone maintainable, was fully obviated before their action was brought.

Holder of a note for money won at play, has no insurable interest in the life of the maker.

The holder of a note given for money *won at play*, has not an insurable interest in the life of the maker of the note. The insurable interest of a creditor in the life of his debtor must be upon a good legal consideration.

An action was brought on a policy on the life of J. R., who was warranted in good health; by a memorandum at the foot of the policy, it was declared that it was intended to cover the sum of 5000*l.* due from Russell to the plaintiff,

(*a*) The office, it is understood, did not take advantage of this verdict, but paid the money to the plaintiffs before they left the Court.

for which he had given his note. Two objections were made on the part of the defendants. 1st, That part of the consideration for the note was for money won at play. 2d, That Russell, at the time he gave the note, was an infant. Mr. Justice Buller nonsuited the plaintiff, upon the ground of part of the consideration of the note being for a gaming transaction, and therefore there was a want of interest in the plaintiff. (*a*)

Trustee may insure for the benefit of the cestui qui trust.

3. A trustee may insure for the benefit of the cestui qui trust. An insurance was made on the life of H. for a year, and during the life of the plaintiff. H. had granted an annuity to the plaintiff's late brother, which annuity he had bequeathed to persons not parties to the insurance, having made the plaintiff executor of his will, and directed him to make insurance. In an action on this policy brought by the executor, it was objected, that as the annuity was not devised to him by the grantee, he had no insurable interest in the life of Holden the grantor. But Lord Kenyon thought this a sufficient interest in the executor to support the action. (*b*)

4. In the case of an annuity, if the premiums are to be paid by the grantee, a contract for the grantor to make insurance will not be usurious, although the annuity be higher in proportion.

In the case of an annuity, if the grantee pay the expense of the premiums, although the grantor covenants to insure, and the annuity be proportionably higher, it will not be usury.

A defendant (*c*) by deed covenanted to pay an annuity of 100*l.* for four lives, and, in thirty days after the dropping of three of the lives, to insure the life of the fourth for the benefit of the plaintiff, who, in consideration, gave 1000*l.* to the defendant: there was a covenant for redemption.

It was argued upon demurrer whether this transaction was usurious.

The Chief Baron (Lord Lyndhurst) said, " That if the expense of insurance was payable by the grantee of the

(*a*) Dwyer v. Edie, 1788; 2 Park, 639, 7th ed.; 2 Marsh. 779.
(*b*) Tidswell v. Angerstein, Peake, N.P.C. 151.
(*c*) Holland v. Pelham, MS. Exchequer, June 8, 1831.

annuity, it would not be usurious, although the annuity was higher in proportion. The statute of usury imposed a penalty when more than 5 per cent. was charged on a loan. This was not a loan, for it was not intended to be returned to the borrower. If the principal was at hazard, it could not be deemed a loan, as between lender and borrower it clearly was at hazard, for the borrower was not bound to return it. If the principal was to be returned by a third person, still it was the same thing between the contracting parties. There was a hazard even according to the contract, for the fourth life might not be insured until thirty days after the expiration of the third. If the fourth life dropped before the expiration of the thirty days, the principal was forfeited." The other barons concurred in opinion, and judgment was given for the plaintiffs.

CHAPTER IV.

OF THE RISK AND ITS DURATION.

1. *The Death must take place during the Continuance of the Policy, in order to entitle a Person to recover.*
2. *Construction of the Rules of a Society as to Payment of Premiums within Fifteen Days after they become due.*
3. *Of the words "from the Day of the Date," and "from the Date."*
4. *Of the Recovery of Interest upon Sums due on Policies.*
5. *Accumulations upon Policies.*
6. *Recovery back of Premium.*

No partial loss in life insurance.

An insurance upon a life, when the loss happens, must be paid according to the tenor of the agreement, in the *full* sum insured, as this sort of policy, from the nature of it, being on the life or death of man, does not admit of the distinction between total and partial losses. (*a*)

In order to entitle a person to recover, the loss, and not merely the cause of the loss, must take place during the continuance of the policy.

1. In order to entitle a party to recover upon a policy, the loss, and not the *cause* of the loss only, must appear to have happened during the continuance of the risk. Thus if a person's life be insured for a year, and some short time before the expiration of the term, he receives a mortal wound, of which he dies *after the year*, the insurer will not be liable; (*b*) and this doctrine is founded upon the general principle of marine insurance; but if it be uncertain whe-

(*a*) 2 Marsh. 780.

(*b*) Per Willis, J. in delivering the opinion of the Court in Lockyer v. Offley; 1 T. R. 254.

ther the death happened within the time limited, this is a question of fact which must be left to the decision of the jury.

An insurance was made on the life of J. Macleane from January 30, 1772, to January 30, 1778. In an action on the policy it appeared, that about the 28th of November, 1777, he sailed from the Cape of Good Hope in the Swallow sloop of war, which ship, not being afterwards heard of, was supposed to have been lost in a storm off the Western Islands. The question was, whether Macleane died before the 30th of January, 1778. To establish the affirmative of that question, the plaintiff called witnesses to prove the ship's departure from the Cape with Macleane, and several captains swore that they sailed the same day; that the Swallow must have been as forward in her course as they were on the 13th and 14th of January, the period of a most violent storm, in which she probably was lost; and that the Swallow was much smaller than their vessels, which with difficulty weathered the storm. Lord Mansfield left it to the jury to say whether, under all the circumstances, they thought the evidence sufficient to convince them that Macleane died before the time limited in the policy, adding, that if they thought it so doubtful as not to be able to form an opinion, the defendant ought to have a verdict. The jury found for the plaintiff. (*a*)

Payment of the premium to be made within 15 days after it was due, or within six months "the member continuing in as good health as when the policy expired;" the member died, leaving a quarterly premium unpaid.

2. Where a *party* effected a policy of insurance with a society, in consideration of a quarterly premium to be paid to the society *during his life*, and the covenants on the part of the society to pay the sum insured, were on condition that *he* (the insured) should pay the proportion of contributions which the *members* of the society should, during *his life*, be called on to make; and by the rules of the society, if any *member* neglected to pay up the quarterly premiums for fifteen days after they were due, the policy was declared to be void, unless *the member, continuing in as good health as when the policy expired*, paid up the arrear within six

(*a*) Patterson v. Black, 1780, 2 Marsh. 780.

months, and 5*s.* per month extra; and the member died, leaving a quarterly payment due at the time of his death; the policy was held to be expired, and not to be revived by a tender of the sum made by his executor within fifteen days after it became due.

An action (*a*) was brought on a policy by executors, effected on the 6th of June, 1796, by which "The Life Assurance Society for the Benefit of Widows, &c. in consideration of a quarterly premium of 2*l.* 13*s.* 6*d.*, to be paid to the society every 25th of March, 24th of June, 29th of September, and 20th of December, during the life of W. Want, covenanted to pay to his wife, after his death, an annuity of 50*l.* during her life;" a rule of the society was added to the policy, providing, "that if any member neglect to pay the quarterly premiums for fifteen days after they become due, the policy will be void, unless the member (continuing in as good health as when the policy expired) shall pay up, within six calendar months then next, all arrears, together with 5*s.* for every month elapsed after such premium became due."

The case was argued upon the particular words of the contract. The opinion of the Court was delivered by Lord Ellenborough, C. J.—"This came before the Court on a special case reserved at the trial of an action of covenant on two policies of insurance, each dated the same day, viz. the 6th of June, 1796. At the trial before me in Middlesex, after the last Trinity term, a verdict was found for the plaintiff for 1000*l.* damages, subject to the opinion of this Court on the following facts," (his lordship then stated in detail the facts as above). The case then states, that continually from the time of making the two policies the quarterly premiums therein mentioned, which respectively became due before and on the 29th of September, 1808, were duly paid within the time allowed for that purpose, but that the quarterly payments which became due on the 20th of December, 1808, were not paid at the time they became due; that W. Want died on the 25th of December, 1808;

(*a*) Want v. Blunt, 12 East, 183.

that he did not in his lifetime pay, or tender, or offer to pay the said quarterly premium, which became due on the 20th of December, 1808, or either of them. But that on the 27th of December, 1808, which was after his death, but within fifteen days after the said 20th of December, when they had become due, the said two quarterly premiums were tendered, and offered to be paid by the executors of the said W. W. Want, to the clerk and receiver of the said society, (to whom also due proof of his death was offered,) who refused to receive them.

This case has been argued on the part of the plaintiffs, on the ground of its being or bearing an analogy to a real estate, and it was said that the premium to be paid by the assured was a condition to *create* an estate; that is, that the annuity to the wife for her life, was to depend on the previous payments of the quarterly premiums by the husband, and which were to create, as it were, the annuity for the life of the wife; and that such conditions need not be strictly performed according to the letter, but that it is sufficient if such conditions be performed as near to the conditions as may be and according to its intent and meaning, although the letter and words of the condition cannot be performed; different from conditions which are to destroy an estate, for those are to be taken strictly. And authorities (*a*) were cited in support of such distinction as to conditions annexed to real estates, but we are of opinion that the analogy does not hold in the present case, and that the rules applicable to conditions with respect to land do not apply. This is a contract of insurance, and must be construed according to the meaning of the parties expressed in the deed or policy. It is an insurance on the life of the husband, not as usually is the case, of a certain sum of money payable on the event of his death during the continuance of the policy of insurance; but of an annual payment of his wife during her life, in case she shall survive him, to commence from and

(*a*) Shep. Touch. 140, 141; and Lit. s. 334, 337; and the cases of Tarleton v. Stainforth, 5 T. R. 695, ante, p. 50; and Salvin v. Jones, 6 East, 571, ante, p. 52.

after his decease. The risk insured against is his death, and the premium is a quarterly payment to be made by him to the society, who are the underwriters, during his life. The duration of the insurance is so long as *he* shall continue to make those quarterly payments, but the insurance is not to be void if *he* pay the quarterly premium within such time after the quarter day as is allowed by the rules of the society. The rules of the society, as stated in the case, are, that if any member should neglect to pay any quarterly premium for the space of fifteen days after the same should become due, then the policy and assurance thereby made should absolutely cease and be void to all intents and purposes; unless *the member making such default* should, within six calendar months then next (*continuing in good health as when his policy was suffered to expire*), pay up all arrears of such quarterly premiums and also 5*s.* for every month and fraction of a month, which should have elapsed since such premium became due.—This is the only rule of the society allowing any further time beyond the quarter day; and by this rule it seems to be allowed to the *assured*, or *member*, to keep the assurance on foot and his policy in force, on the terms of simply paying up the quarterly premium, if the neglect has not exceeded fifteen days after the same became due, without any additional penalty, and without the condition which is imposed in case of longer neglect, *of being in as good state of health as when his policy expired.* But the plaintiff contends, and his whole case depends on making out that point, that by the true construction of this society and the clause in the policy referring to it, it is not necessary that *the party whose life is insured should himself pay, or cause to be paid*, the premium within the fifteen days, though the event insured against may not have happened. In order to determine this part, it is material to consider, 1st, whether at the time of the death of the person insured the policy were or were not expired; because if the policy were expired at the time, the defendants cannot be held liable. Now the insurance is for a quarter of a year, and

so on from quarter to quarter, and it expires at the quarter day. Such is the clear understanding of the parties, as expressed in the rule of the society referred to by the policy and stated in the case, viz. (continuing in as good health as when *his policy was suffered to expire*); that must refer to the quarter day up to which only the premium had been paid, and cannot include the further term of fifteen days, which must be covered by the further premium, each premium being for an insurance for a quarter of a year only, and not for a quarter and fifteen days. To this point, the case of Tarleton and others v. Stainforth and others, 5 T. R. 695, is an authority. So that the death of Want happened during a period not covered by the policy, viz. on the 25th of December. Again, by the constitution of this society, every person making an insurance on his life becomes a member of this society, and executes the deed of settlement, as it is stated in the policy; that W. W. Want had done in this case, and is liable to contribute to answer the claims made on the society; and the committee, that is, the defendants, covenant with Want, to pay the annuity to his widow after his death, if he shall pay the premiums on the days specified, or within the time allowed by the rules of the society; and if he shall also pay and contribute his proportion of the monies which the members of the society shall, *during his life*, be called upon to pay and contribute, according to the rules of the society, towards making good the deficiency. It is clear, therefore, that he was only to contribute to such claims as the *members* of the society should be called upon to pay *during his life*, and if any calls had been made on the 26th of December, they could not have affected him or his estate; and yet after he has ceased to be a member of the society, it is insisted, that a payment may be made on his behalf to secure the liability of the society to some person at the time of payment of the premiums not a member of the society. The whole tenor of the policy and rules and orders show, that no person can be assured without being a member. It is a society insuring each other. The first step required is to sign the

deed of settlement and become a member, and then the premium is paid by him as a member of the society; so that no person, except he or she be a member of the society, is entitled to make assurance with them; and the paying a premium for another quarter is making a new insurance, though under the former policy. The whole frame of the policy too shows that every premium must be paid during the life of the assured. The agreement for the insurance, stated in the beginning of the policy, is in consideration of a quarterly premium of *2l.* 13*s.* 6*d.* to be paid during the life of W. W. Want. The covenant of the defendants to pay the wife's annuity after Want's death, is, "if Want shall pay, or cause to be paid, the quarterly premium on every quarter day during the *life of Want*, or within such time after as shall be allowed by the rules of the society for that purpose;" in construing which sentence the expression, during the life of Want, must be understood as applying and carried on to the latter part of the sentence, and is the same as if the words, "during his life," had been repeated after the words *within such time after*, i. e., or within such time after *during his life.* It is observable that, throughout the policy, the words *executors* or *administrators* are used only; in the covenant of the defendants when they covenant with the said Want, his *executors*, and *administrators* to pay the *annuity* to his widow after his death; and then the addition of those words was proper and necessary, inasmuch as the covenant must necessarily be enforced by his executors or administrators, the same not being to be performed till after his death. In every other act to be done, it is expressed as being to be done by Want, or as being neglected to be done by Want, or by such *members* of the society, without any added words indicating an intention that it should be any other than the personal act or neglect of the assured. For these reasons we are of opinion, that the death of W. W. Want, which happened on the 25th of December, was during a period of time not covered by the policy; and that on the true construction of the policy and rules of the

society, the insurance could not be continued beyond the expiration of the quarter which ended on the 20th of December, by a tender of the premium by his executors after his death, though within fifteen days after the quarter day, so as to include within the policy the period of his death. —Judgment of nonsuit must be entered.

The words "from the date," and "from the day of the date," mean the same thing.

3. The question, whether a period of time to commence from the *day of the date* was inclusive or exclusive of that day, occurred in an action upon a policy of insurance upon the life of Sir Robert Howard, for one year from the *day of the date* thereof, which was the 3d of September, 1697. Sir Robert died on the 3d of September, 1698, at one o'clock in the morning. Lord Chief Justice Holt held that "from the day of the date" excludes the day, but "from the date" includes it, and therefore the day of the date being excluded in this case, the insurer was held liable (*a*); but in Pugh v. The Duke of Leeds (*b*), it was held, after great deliberation, that the words "from the date" and "from the day of the date" mean the same thing; and that they are to be taken to be either inclusive or exclusive, according to the context and subject-matter; and that either meaning shall be adopted which shall most effectually support, not defeat, the intention of the parties. As this case of Pugh v. The Duke of Leeds would not be sufficient to obviate questions from arising in all cases, since it might be very difficult to ascertain the intention of the parties upon a policy of insurance, except from the policy itself, it is now usual to state in the policy the day of the commencement of, and the termination thereof, and to declare that both are inculsive.

Usual in policies to state that the days of its commencement and termination are both inclusive.

Of the recovery of interest upon sums payable under policies of insurance.

4. The party insuring is not, primâ facie, entitled to recover *interest* upon the principal sum insured from the expiration of a certain period after proof of the death of the assured, the policy covenanting to pay a certain sum within such certain period after due proof of the death of the as-

(*a*) Sir Robert Howard's case, 2 Salk. 625; 1 Ld. Raym. 480. (*b*) Cowp. 714.

sured. An action of covenant (*a*) was brought upon a policy of insurance, bearing date the 10th of March, 1819, by which the defendants covenanted to pay to the plaintiff 4000*l.* at the expiration of six months after due proof of the death of R. C. Burton. The cause was tried before Bayley, J., at the assizes for the county of York, and the principal question was, whether R. C. Burton's life was an insurable life at the time when the policy was effected. The learned judge summed up the evidence to the jury with reference to that question, no point having been then made as to interest; but when the jury returned a general verdict for the plaintiff, his counsel then claimed to have interest allowed upon the principal sum insured from the time when that sum became due. It was stated in the affidavits that R. C. Burton died in April, 1821, and that due proof of his death was given to the defendants, so that the principal sum insured became due on the 6th of November, 1822, and that the interest upon that sum, to the first day of Michaelmas term, 1823, amounted to 200*l.* A rule nisi having been obtained for increasing the damages to 400*l.* cause was shown.

Abbott, C. J.—It is now established as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade or other circumstances. It is of importance that this rule should be adhered to; and if we were to hold that interest was payable in this case, the application of the general rule might be brought into discussion in many others. Interest was not claimed by the plaintiff's counsel in this case until the judge had concluded his address to the jury upon the principal question for their consideration, and they had pronounced their

(*a*) Higgins v. Sargent, 2 Barn. & Cress. 348. There is a report of this case at ni. pri. in Farren, on Life Insurance, p. 175, but as it was a case of conflicting evidence, and the directions of the judge are not stated, it has been omitted, as not containing any useful doctrine.

verdict upon that question in favour of the plaintiff. It was then contended, for the first time, that the plaintiff was entitled to have interest allowed him upon the principal sum secured by the policy from the time when it had become payable, and that point was reserved by the learned judge. The only question upon the present rule is, whether the jury ought to have been told that they were bound by law to give the plaintiff interest from that time; for if it was a matter for their discretion only, and it was not properly submitted to them, that may be a ground for granting a new trial, but not for increasing the damages. Inasmuch as the money recovered in this case was not due by virtue of a mercantile instrument, and as there was no contract, express or implied, on the part of the defendant to pay interest, I cannot say, that the jury ought to have been told to give interest."

Bayley, J.—" I am of the same opinion. It was once the opinion that money lent carried interest, and in Calton v. Bragg (*a*) it was so contended, on the ground that the lender would otherwise, for the accommodation of the borrower, lose the benefit which he might make of his capital, and that the lender ought in equity to be put in the same situation as if he had applied his principal to his own use. But this Court held, that interest was not due by law for money lent without a contract for it expressed, or to be implied from the usage of trade, or from special circumstances. Now if interest be not due for money lent, which is to be repaid either upon demand or at a given time, it follows, that it is not due for money payable within a certain time after due proof of the happening of a particular event. The circumstance of the money having become due in this case by virtue of a contract under seal, does not make any difference. If it were the intention of the parties that the principal sum should bear interest from the time when it became due, that might have been expressly provided for in the deed; but not having been done, the law will not imply a contract on the part of the defendants to pay in-

The circumstance that the money has become due by virtue of a contract under seal, does not render interest payable.

(*a*) 15 East, 224.

terest, and consequently the jury ought not to have been directed to give interest."

Holroyd, J.—" I think that the judge would not have been warranted in directing the jury to give interest in this case. It is clearly established by the later authorities, that unless interest be payable by the consent of the parties, express, or implied from the usage of trade, (as in the case of bills of exchange,) or other circumstances, it is not due by common law. In De Haviland v. Bowerbank,(*a*) Lord Ellenborough was of opinion, that where money of the plaintiff had come to the hands of the defendant, to establish a right to interest upon it, there should either be a specific agreement, or something should appear from which a promise to pay interest might be inferred, or proof should be given of the money being used; and in Gordon v. Swan(*b*) the same judge said, that the giving of interest should be limited to bills of exchange, and such like instruments and agreements reserving interest. In the latter case, although the money was payable at a particular day, non-payment at that day was held not to give any right to interest. Independently of these authorities, I am of opinion, upon the principles of the common law, that interest is not payable upon a sum certain payable at a given day. The action of debt was the specific remedy by the common law for the recovery of a sum certain. Now in that action the defendant was summoned to render the debt, or show cause why he should not do so. The payment of the debt satisfied the summons, and was an answer to the action. If this, therefore, had been an action of debt, the payment of the principal sum would have been a good defence, because the interest is no part of the debt, but is claimed only as damages resulting from the non-payment of the debt. When indeed the instrument becomes payable by virtue of a contract, express or implied, then it becomes part of the debt itself, and consequently it would then be no answer to an action of debt for the defendant to show that he had paid the principal sum advanced; here then

(*a*) 1 Campb. 50. (*b*) 12 East, 410.

being no contract, express or implied, to pay interest, it was no part of the debt, but could only be recovered by way of damages for detaining the debt. Inasmuch, therefore, as it appears that if the plaintiff had pursued that remedy, which by the common law is specifically applicable to this case, he could not have recovered interest, I think, that he ought not to be permitted to recover interest by way of damages in an action of covenant." Rule discharged.

The bonuses or accumulation upon a policy held to follow the sum insured.

5. According to the constitution of many of the offices, a share of the profits of the business is added from time to time, by way of bonus, to the sum insured.

Where (*a*) a policy of insurance, effected at the Equitable Office, was assigned to trustees, with "all sums of money, benefits, and advantages, to arise, accrue, or become due or payable upon, or by virtue of it, in any manner howsoever," which was afterwards included and referred to in a marriage settlement, as "all that sum of 3000*l.* assured by the before mentioned instrument or policy of assurance;" and the settlement contained a power for one of the cestui que trusts to appoint the same by will, who afterwards by her will, made in pursuance of the power, bequeathed the same to certain persons; and the sum of 3000*l.* had upon the death of the insured amounted to the sum of 9270*l.* by accumulations or bonuses added to it; it was held, that the legatees were entitled to take the 3000*l.* according to their several interests, with the respective shares of accumulation or bonuses in addition.

Recovery back of premium.

6. Few cases occur upon policies of insurance on lives, in which the question of a return of premium can arise; in most policies there are express stipulations on the subject. As before observed, where the risk is *entire*, there is by the general law of insurance no return of premium, though the policy should determine the next day. If however the risk has never begun, from whatever cause, unless

(*a*) Courtney v. Ferrers, 1 Sim. 137.

it be fraud, the premium, as appears from the general law of insurance, shall be returned, for a policy of insurance is an indemnity. The underwriters receive the premium for running the risk of indemnifying the insured, and therefore if they run no risk, and no fraud be imputable to the parties insured, the consideration for which the premium was paid to the underwriters fails. (*a*)

It may be inferred also, that if after the loss had happened, payment was resisted on the ground of want of interest only, in a policy upon life, and the defendants succeeded, a return of premium might be insisted upon. (*b*)

If fraud be committed by insurers, the premium may be recovered back; (*c*) but if the contract become void by the fraud of the insured, or his agent, it will not be recoverable. (*d*)

It appears, however, from two early Chancery cases, Whittingham v. Thornburgh, (*e*) and Da Costa v. Scanderet, (*f*) the former of which was a case of life insurance, that where fraud had been committed, the Court decreed the policies to be delivered up to be cancelled, and the premium to be *repaid:* the same rule appears to have been followed at law in the case of Wilson v. Ducket, (*g*) before Lord Mansfield, in which the point was specially argued. His lordship, however, afterwards altered his opinion, as appears by the case of Tyler v. Horne (*h*), which has since been followed by that of Chapman v. Fraser (*i*).

It has been before observed, that the party whose life is insured by another person, must be considered as the agent of the person effecting the insurance, and that the latter is bound by the misrepresentations of the former. It may be doubted, however, whether a party effecting

(*a*) See Tyrie v. Fletcher, Cowp. 668; 2 Marsh. 663.
(*b*) Routh v. Thompson, 4 East, 428.
(*c*) Duffell v. Wilson, 1 Campb. 401.
(*d*) Tyler v. Horne, Park, 329, 7th ed. Chapman v. Fraser, 2 Marsh. 661.
(*e*) 2 Vern. 206; Prec. Chan. 20. (*f*) 2 P. Wms. 470.
(*g*) 3 Burr. 1361. (*h*) 1 Park, 329, 7th ed 2 Marsh. 661.
(*i*) Ibid.

an insurance is so far bound by the misrepresentations of the assured as to preclude him from recovering back the premium where he is not privy to the fraud or misrepresentation.

In a recent case of Duckett v. Williams(*a*) it appears, that the defendants, who were directors of the Hope Insurance Company, had obtained a verdict in an action brought against them upon a policy of insurance on the life of a Mr. Stephenson effected by the plaintiff. The party assured had falsely represented the state of his health to the office, but the plaintiff was not aware, as it appeared, of the real condition of the assured's health, who had been long labouring under a disorder of a most virulent nature, which caused his death shortly after the insurance was effected. The plaintiff afterwards moved for a new trial, with the view to recover back the premium, which the Court granted on payment of costs, the defendants being allowed to enter verdicts in the counts of the former declaration as to the policy.

(*a*) Excheq. Feb. 1, 1832, MS.

CHAPTER V.

OF ASSIGNMENT OF POLICIES OF INSURANCE UPON LIFE.

1. *Of Assignment in general.*
2. *Of Notice to the Office.*

THE question has been agitated, whether an assignment of a policy even for valuable consideration is valid at all, so as to enable the assignee to sue upon it in the assignor's name, and the point turns upon the stat. 14 Geo. 3, c. 48, which requires an *interest* in the life insured; but in a recent case it was held by the Vice-Chancellor, that such an assignment for valuable consideration is good, provided there be no objection to its validity at the time the policy be effected. If the party effecting the policy possess an insurable interest at that time, that interest will be sufficient to support the policy in the hands of the assignee for valuable consideration, and he will be entitled to stand in the place of the original assignee, so as to bring an action in his name for the sum insured. In this case one of the mesne assignments was voluntary, but valuable consideration had been given for it by a subsequent assignment;(*a*) the effect of this decision, however, is not such as can prevent questions being raised between the assignee and the office; it merely decides his right to bring an action.

An assignment of a policy valid at the time of execution, is good in the hands of the assignee.

It is by no means an unusual thing for a person who has insured his life to assign the policy by way of collateral security for a loan of money or a debt. If the assignor be a trader within the meaning of the bankrupt laws great danger will accrue to the assignee in respect of

(*a*) Ashley v. Ashley, 3 Sim. 151.

his security, as will hereafter be shown, unless due notice of the assignment be given to the office insuring. The danger indeed exists with respect to individuals not traders, in the event of their taking the benefit of the Insolvent Act. In these assignments (*a*) it is usual to stipulate, that if the debt for which it is the security be not paid within the period named, it shall be lawful for the assignee, without the consent of the assignor, to sell the policy; and a power is inserted to give a receipt for the purchase-money, and to exonerate the purchaser from any liability or responsibility, and out of the monies to satisfy any premiums paid by the assignee for the purpose of keeping the policy on foot, and all costs, and to apply the residue towards payment of the sum due, and to pay the surplus to the assignor. The assignor constitutes the assignee his attorney, to bring actions and give receipts, and covenants to pay the premiums, and to produce to the assignee within a certain period receipts for the same, and that he will observe the terms and conditions of the policy; that if the assignor do not pay the premiums the assignee may do so, and such sums shall stand charged on the policy; that the assignor will not do certain acts whereby the policy would be vitiated, or require a higher premium, as to go beyond the limits of Europe; and that he will not release the sum due on the policy.

In case of assignment, notice of the assignment should be given to the office, in order to take the policy out of the order and disposition of the assignor in case of his bankruptcy.

It may now be considered as the law, that the assignment of a policy of insurance upon a life will not take it out of the *order* and *disposition* of the assignor within the meaning of the bankrupt laws, (and probably also of an insolvent under the Insolvent Act,) unless notice of the assignment be given to the insurers before the bankruptcy, and that the policy, in defect of notice, will vest in the assignees notwithstanding the assignment.

By a policy of insurance, (*b*) dated October, 1798, under the hands and seals of two of the trustees of the Equitable Assurance Company, the trustees, in consideration of the

(*a*) For a form of assignment, see Appendix.

(*b*) Williams v. Thorpe, 2 Sim. 257.

annual premium of *27l. 5s. 6d.* to be paid by John Newman, assured unto him the sum of 1,000*l.*, to be paid to his executors, administrators, and assigns, within six months after his decease. Newman, being indebted to the defendants Joseph Thorpe and J. T. Thorpe and C. H. Thorpe, deceased, by an indenture, dated the 8th of August, 1820, assigned this policy, together with another policy of the London Life Assurance Company, to C. H. Thorpe and Joseph Thorpe, subject to redemption upon payment of 2,030*l.* and interest.

Soon after the execution of the assignment, Newman, having paid off part of the debt, C. H. Thorpe and J. Thorpe delivered up to him the policy effected with the London Life Assurance Company, but retained possession of the other policy, as a security for the remainder of the debt. *No notice* of the assignment was ever given to the Equitable Assurance Society. In November, 1821, Newman became a bankrupt, and the plaintiffs were chosen his assignees. The policy was afterwards sold by auction to Mr. Briggs for 1,000*l.* Briggs and the auctioneer were made defendants to the bill; but upon the deposit and balance of the purchase money being paid by them into Court, and an assignment of the policy being executed to Briggs by all proper parties, the bill was dismissed as against them.

The bill alleged that the bankrupt, at the time of his bankruptcy, was left in the *apparent ownership* of the money secured by the policy, and that the right thereto thereupon passed to the plaintiffs as the assignees under the commission. The bill prayed that Thorpe might be ordered to join with the plaintiffs in an assignment of the policy to Briggs, and to deliver it up to him upon payment of his purchase money; and that the plaintiffs, as assignees of the bankrupt, might be declared to be entitled to receive such purchase money, and that the same might be paid them accordingly. The defendants by their answer said, that assignments or transfers of policies of assurance granted by the Equitable were never entered in any books belonging to that society, or in any manner noticed by it, and

that there was not any rule or regulation of the society for any such entry; but that all right and interest in and to every policy of assurance was effectually assigned by the delivery of the policy and the usual assignment thereof; that it never was nor is necessary for any person to whom such assignment is made, to have his name entered in any book belonging to the society, or to be in any manner known to such society as the holder of the policy; that at the time, and on the occasion of the execution of the assignment, Newman delivered to C. H. Thorpe and the defendant Joseph Thorpe the policy effected at the Equitable, and also the other policy; and that the former policy had continued in the possession of C. H. Thorpe and J. Thorpe during the life of C. H. Thorpe, and that since his decease it had been and was then in the possession of the defendant Joseph Thorpe; that no notice was given to the Equitable Assurance Company or their trustees or agents of the assignment of that policy, nor was any entry of such assignment made in the books of the company, but that Joseph Thorpe had paid to the Equitable the two years annual premium, which became due on the policy in the month of October, 1822 and 1823; and that, according to the rules and regulations of the Equitable, it was not necessary, in order to give effect and validity to the assignment, that the same should be entered in any book belonging to such society, and that, in fact, the Equitable had not any book wherein to enter the assignment of their policies; and that, when assignments of their policies were made, it was not usual or necessary in any manner to apprize the society of such assignments; that at the time of the issuing forth of the commission of bankruptcy, Newman was indebted to Charles H. Thorpe and J. Thorpe in the sum of 1,400*l.*, being the residue then remaining due of the debt, for the securing of which Newman had executed the assignment and delivered to them the policies of insurance, and that at that time the policy effected with the Equitable was in the hands of C. H. Thorpe and J. Thorpe as a security for their debt, and that therefore the bankrupt was not, at the

time of his bankruptcy, left in the apparent ownership of the policies or of the money secured by it, and that the right thereto did not pass to the plaintiffs as the assignees under the commission; that there was still due and owing to J. Thorpe, as having survived C. H. Thorpe, upon the security of the assignment, the sum of 1,460*l.*, including the premiums paid on the policy since the assignment.

The actuary of the Equitable, who was examined for the defendants, deposed that it was not usual or customary, and that the regulations of the society did not require that, in order to give effect or validity to assignments of their policies, notice should be given of such assignments to the society; that although notice of assignments of policies effected with the society was sometimes given to the society, yet the society had not any books or registers of such notices.

For the plaintiffs was cited Ex parte Usborne(*a*), Ex parte the Vauxhall-bridge Company,(*b*) Ex parte Monro(*c*).

For the defendants Ex parte Richardson(*d*).

The Vice-Chancellor, Sir Launcelot Shadwell—"The question in this case is concluded by the decisions in the cases that have been cited for the plaintiffs in Ex parte Monro. The Vice-Chancellor(*e*) says, 'Did the delivery of the bond by the bankrupt take away his power to receive the debt? Certainly not.' Supposing that the executor of Newman had obtained payment of the sum insured from the office, could the office have been compelled to pay it over again to Thorp? I see no ground upon which the office could have been compelled to make a second payment. If this society does not take notice of assignments, it takes all the risk of such conduct upon itself. It appears to me, that the question that has been discussed is concluded by authority. Declare the plaintiffs entitled to the benefit of the policy."

This decision has been since further corroborated by the following, in which, as some doubts had been expressed as to the correctness of the former opinion, the Vice-Chan-

(*a*) 1 Glyn and Jam. 358. (*b*) Ibid. 101. (*c*) 1 Buck. 300.
(*d*) Ibid. 480. (*e*) Sir John Leach.

cellor detailed the grounds and authorities for his decision at length.

This was a petition (*a*) by Colvill and Geddes, assignees of a bankrupt. It stated that Benjamin King had, before his bankruptcy, effected two life policies; that the commission had issued; that after the bankruptcy, Davis claimed to be entitled to the policies or the monies produced by the sale thereof, by virtue of an assignment to him of the policies before the bankruptcy; that no notice of the assignment of the policies was given to the office until long after the issuing of the commission, and that, under the circumstances, the policies remained in the order and disposition of the bankrupt; that by an order of the commissioners, the policies and the monies thereby assigned were ordered to be sold by public auction; that at the time the order was made, the petitioners had no ground for suspecting that notice of the assignment had not been given; that in pursuance of the order of the commissioners, the two policies were sold for the sum of 840*l.* and 540*l.*; that the said two sums form part of the separate estate of King; and the petitioners are advised that they, as such assignees, are entitled to receive the same; that the said Davis died about the month of April, 1830. The petition prayed, that it might be declared that the said two sums of 840*l.* and 540*l.* form a part of the separate estate of King, and that the said two sums might be paid to the petitioners.

The Vice-Chancellor.—"The question is, whether as no notice was given to the assurance companies of the assignment of the policies to Davis, although the policies were delivered to him, the monies secured by the policies did or not remain in the order and disposition of the bankrupt King, within the meaning of the 72d section of the 6th Geo. 4, c. 16. For the respondents, it is insisted that the assignment of the 1st of July, 1829, accompanied by the delivery of the policies, passed the whole beneficial interest to King, and, in support of that, two cases are cited Ex parte Byas, 1 Atk. 124, and Falkener v. Case, 1 Bro.

(*a*) Ex parte Colvill and Geddes, re Severn, Key and Severn, 1 Mont. 110.

125, 2 T. R. 491. It is to be observed, however, that in Ex parte Byas, it is not stated whether notice was given to Mrs. Devereux before Hankell's bankruptcy of the delivery of the note to Byas; nor in either of the reports of Falkener v. Case is there any statement made as to notice given to the underwriters. Indeed it must be inferred, that in neither of the cases was notice given to the persons legally liable to pay; and it appears that both cases were decided without any question being raised upon the effect of there being no such notice. According to the report in 2 T. R. 494, the Lord Chancellor admitted that if the question had been concerning a bond or any chose in action that had remained in possession of the bankrupt at the time of the bankruptcy, it would have been within the statute of James, just as if the possession of Barclay, the broker, of the policy, subject to his own claim and lien, was not the possession of the bankrupt. In p. 495, the Lord Chancellor is made to say there was not a scintilla of property in the bankrupt; though a few lines above, his lordship states truly, that his right was merely equitable to redeem from Barclay. The decision in Row v. Dawson, 1 Ves. 331, does not affect the present question, because there the draft, which Lord Hardwicke said amounted to an assignment, was deposited with the officer Swinburn, and therefore attached immediately upon it; so, in effect, there was notice given to the person liable to pay. In Ex parte Smith, Buck, 149, it does not appear that the policy of insurance ever was assigned at all, and, in fact, the goods insured were destroyed before the bankruptcy, so that the question in that case never did or could arise; and in Ex parte Richardson, Buck, 480, the present Master of the Rolls held, upon the circumstances of the case, that the stock was not in the order of the bankrupt with the consent of the true owner. Whether that inference was rightly drawn, it is not necessary to discuss; but I think the learned judge did not mean to overrule his own decision, in the preceding year, of the case Ex parte Monro.(*a*) Sir T.

(*a*) 1 Buck, 300.

Parker, in Ryal v. Rowles, 1 Ves. 367, 1 Atk. 177, lays down the rule, that if a bond is assigned, the bond must be delivered, and notice must be given to the debtor; but in assignments of book debts notice alone is sufficient, because there can be no delivery. Only two months before this was stated by Sir Thos. Parker, Lord Hardwicke had decided Row v. Dawson, in which he alluded to the case of Ryal v. Rowles, as being then under the consideration of the Court, and stated it was made a question how far the assignment of a bond should be supported against assignees under the commission. Yet Lord Hardwicke allowed the statement of the rule by Sir T. Parker to pass without observation. It is reasonable, therefore, to suppose that he thought it correct. In Jones v. Gibbons, 9 Ves. 410, Sir Wm. Grant, alluding to Sir T. Parker's rule, says, "it might, perhaps, have been made a question whether, after assent and delivery of the security to the assignee, the bankrupt could be said to have the order and disposition merely because there was no notice to the debtor of the assignment. Probably that requisite was added, as otherwise the debtor might safely pay the money to the person who had, without his knowledge, ceased to be his creditor. The debtor would be bonâ fide in making the payment, and it would be impossible to make him pay again. Sir Thomas Parker lays it down certainly that there must be that notice. In Ex parte Monro v. Frazer, Buck, 300, the question that is now before me came before the present Master of the Rolls. The bankrupt being the obligee in a bond, and being indebted to Monro, as a security for the debt, assigned the bond to him, and also delivered the bond into his possession, but notice of the assignment of the bond debt was not given to the obligor. A commission issued, and money due on the bond having been paid under an arrangement, the question was raised whether Monro or the assignees in the bankruptcy were entitled, and his Honor decided that the assignees under the commission were entitled. He said, 'in this case did the delivery of the bond by the bankrupt take away his power to receive

the debt; and if the obligee had bonâ fide paid the debt to the bankrupt, could the petitioner have called upon him to repay it? Certainly not; and if an action had been brought on the bond by the obligor, he might have discharged it by way of set-off. In respect of any dealings with the bankrupt, without notice of the assignment, I find the practice of the commissioners has been conformable to the rule stated in Ryall v. Rowles. The absence of any decision to the contrary since the time of Lord Hardwicke, shows that rule to have been acquiesced in, and I think rightly; for the obligee, where notice is not given, may obtain payment of the debt, which is sufficient to leave it in his ordering and disposition within the meaning of the statute.' The same principle is, in effect, acknowledged in Ex parte Burton re Fossett, and Ex parte Osborne re Baker, 1 Glyn and James, 207, 358, where book debts due to the assignor, being assigned without notice to the debtor, were held to belong to the assignees in bankruptcy of the assignor. I no otherwise notice the decision in Williams v. Thorpe, 2 Sim. 257, which was precisely upon the point now before me, than to observe, that there has not been any appeal from it. It was made some months before the late Lord Chancellor decided the cases of Dearle v. Hall, and Loveridge v. Cooper, upon Appeal, 3 Russ. 1. These cases, decided first by Sir T. Plumer and afterwards by Lord Lyndhurst, have established, that where there is an assignment made of a trust fund, of which no notice is given to the trustees, it shall be void in equity as against a subsequent assignment, of which notice is given to the trustees. With respect to those two cases I must observe, that Cooper v. Fynmore, 3 Russ. 60, which follows them, was not noticed in the argument. It could not have been noticed by me with any effect, because my note does not contain the fact, that notice of the assignment was actually given, though that circumstance appears upon Mr. Russell's report. It does not appear whether the point was much argued in Cooper v. Fynmore, but it was repeatedly and most laboriously argued in Dearle v. Hall and Love-

ridge v. Cooper. It is clear, that by the assignment of the 1st of July, 1829, the bankrupt parted with no legal right to the fruit of the policy. If he had assigned the policies to a second incumbrancer, and his executors had concurred in allowing payment of the proceeds to the second incumbrancer, that payment would have been good. If King, after the assignment to Davis, had sold his interest in the policies to the insurance office, his release to them would have been good, and altogether defeated the claim of Davis. If the policies had been lost by Davis, and King had assigned his interest in the proceeds to a second incumbrancer, and had given notice of that assignment, according to Dearle v. Hall and Loveridge v. Cooper, the second incumbrancer would have been entitled. King, therefore, might have sold and released the policies, notwithstanding the assignment to Davis; and I am of opinion, both upon precedent and principle, that the order of the commissioners is wrong, and that the policies did, at the time of the bankruptcy, remain in the order and disposition of King within the meaning of the statute. His assignees therefore are entitled to the proceeds."

Observations on Williams v. Thorpe and Ex parte Colvill and Geddes.

These decisions upon this point have, it is said, given much dissatisfaction to the mercantile world. This species of security by assignment of policies is frequently resorted to, but the party assigning is not desirous that a fact, tending to affect his credit, should acquire that notoriety which notice to a public office may have the effect of giving it. If it is to be assumed as a principle of law, without exception, that in all cases of assignments of *choses in action* notice must be given to the debtor, obligor, covenantor, or trustee, in order to make the assignment available to all intents and purposes as against third persons, the doctrine of the preceding cases is incontrovertible; annuities, however, bills of exchange, and promissory notes, appear to be an exception to this rule. Upon principles of public policy the general doctrine may be sound and wholesome; at the same time it may with deference be inquired, whether the analogy assumed to exist between *bonds* and *policies*

of insurance has not, in these cases, been carried rather further than the nature of the several contracts will warrant? It has been repeatedly held, both at law and in equity, that a policy of insurance is an *indemnity*, an *aversio periculi*. In the case of nominee insurances made for short periods, as to secure a debt, they are obviously *indemnities;* and even in the ordinary case of a person insuring his own life, a policy is in the nature of an *indemnity* to his family against the *loss* which might be sustained *by his death*. Policies of insurance have sometimes also been placed upon the footing of *wagers*, and they very much resemble a species of wager not uncommon in the mercantile world, viz. a periodical payment to be made by one party until a certain event happens, upon the condition of receiving a sum of money from the other party upon the happening of the event. An *indemnity* is a *security* against *future* loss or damage, whilst a *debt* is a *sum of money due and owing*. Any payment under an indemnity is *contingent*, both as to time and *circumstances;* upon a debt it is *certain* and *immediate*, consequently the grounds of the necessity of notice in the case of a debt due in præsenti are obvious. According to natural reason, no man would accept as a security from A., or give valuable consideration to A. for an assignment of a debt actually due and owing to him from B., unless notice be forthwith given to B., because, if notice be not given, A. may still recover the debt as soon as he pleases; but the case is very different upon a policy; until the event happens upon which payment is to be made, no debt has accrued, and therefore the debtor could not have been called upon to pay to the wrong person.

It is understood to be the usual practice of the offices to pay the holder of the policy who effects a nominee insurance, or the personal representatives of the party effecting the policy upon his own life, or if it has been assigned, to the holder, with the consent of such personal representatives, or of the party effecting the insurance, as the case may be. If the doctrine of Dearle v. Hall and

Loveridge v. Cooper (*a*) is to be held as affecting payments upon policies, offices will be frequently placed in an embarrassing situation, and must drive the parties to interplead. By these cases it was held that the subsequent assignee of a chose in action (a trust fund), who gave notice to the trustee, should be preferred to a prior assignee who neglected to do so. If a party, therefore, takes a policy as a deposit, accompanied by a regular assignment, if he does not give notice to the office, who may be considered as trustees or debtors, he will be subject to be postponed to a person holding a subsequent assignment, who does give notice. The second assignee will in equity be considered entitled to the proceeds of the policy, although he is not in possession of it, and cannot deliver it up to be cancelled, (the rule of most offices upon paying upon a policy,) whilst the first assignee with the policy in his hand, and although furnished with the necessary consents, will not be entitled to receive upon it. It may be presumed that in such a case an office would not pay to one or the other without an ample indemnity.

A second assignee giving first notice of the assignment to the insurers will be preferred to the first.

The 30th section of the Insolvent Debtors' Act (7 Geo. 4, c. 57) adopts the language of the Bankrupt Act so closely upon this subject, that there can be little doubt that the doctrine of the above cases, unless it should undergo alteration, must be considered to be applicable to cases of insolvency.

The Insolvent Debtors' Act uses the language of the Bankrupt Act.

Some offices are in the habit of advancing small loans upon the security and deposit of policies effected with themselves. In such a case, of course, no question of notice can arise.

(*a*) 3 Russ. 1.

CHAPTER VI.

OF THE ATTACHMENT OF EQUITIES TO POLICIES OF INSURANCE ON LIFE IN FAVOUR OF THIRD PERSONS.

1. *In general no Equity in favour of Third Persons.*
2. *Equity attaches in cases of Trust.*

In general no equity attaches upon policies in favour of third persons.

1. POLICIES of insurance, as well on life as on fire, are separate and distinct contracts between the insured, or party effecting the insurance, and insurers, made for the sole benefit of the insured, or party effecting the insurance, whatever may be the nature of the interest covered by it; and unless there be some contract or agreement, or trust, express or implied, between the insured, or party effecting the insurance, and third persons, the latter can have no more right in a court of equity than in a court of law to affect the proceeds of the policy in the hands of the insured.

Susannah Baker, (*a*) in consideration of 1150*l.*, assigned certain premises, called Pond Farm, to Law for ninety-nine years, if she should so long live, subject to redemption, and Law subsequently assigned to Collier. S. Baker, with other necessary parties, afterwards conveyed the said premises, with others, in fee, to certain persons as trustees to sell. The trustees agreed to sell the equity of redemption of Pond Farm to Collier, to whom it had been assigned as aforesaid during the life of S. Baker, for 4800*l.* Law, to whom the life-interest of S. Baker in the premises had been originally assigned, had insured S. Baker's life, to secure himself from loss in respect of the money advanced, and sub-

(*a*) Watson v. Brutton, MS. Feb. 24, 1830.

sequently assigned the policy to Collier, who kept it on foot, and also effected another policy on S. Baker's life for 700*l.*, and on the death of S. Baker received the sums due on both policies. Collier agreed to pay the 4800*l.* on the 29th of September then next (1819), provided, that in case S. Baker should be living at the time of the payment of the purchase-money, Collier should be allowed 1150*l.* thereout (the value of the life-interest previously paid). In case any unforeseen occurrence should prevent the conveyance of the said premises from being executed by the 29th of September, Collier was to pay interest on the 4800*l.*, subject to such deduction as aforesaid, from the 29th of September until the completion of the purchase. If Collier made default, the conveyance being ready on the 29th of September, a penalty, as liquidated damages, was to be paid, and the contract was to be void. Delay took place in the conveyance until after the 29th, but without the default of Collier: S. Baker lived over the 29th of September, and died in 1822.

It was submitted by the plaintiffs, who were the assignees under the insolvency of the eldest son and heir at law of S. Baker, (and also tenant in fee under a settlement,) that if Collier was entitled to be allowed the 1150*l.*, that they were entitled to stand in his place as to the sums recovered upon the policies. But the Vice-Chancellor held, 1st, That upon the contract with Collier, the 29th of September was the period upon which the contract for the conveyance was to be completed, and that Susanna Baker having survived that period, Collier was entitled to the 1150*l.* to be allowed on that event, and that he was also entitled to the 1100*l.* secured upon the policy, no equity attaching upon it in his hands in favour of the plaintiffs.

The case of a tenant for life of premises insuring from fire and afterwards burnt down, was pressed in argument, and it was urged that the tenant in remainder might have an equity to compel a tenant for life to rebuild, or at least to be entitled to the proceeds of the policy for that purpose, on payment of the premiums and interest; but the Vice-

Chancellor answered, that the point had never been decided, but that he thought there was no such equity. (*a*)

2. Where, however, a contingent interest is assigned in trust by way of security for a debt, and the assignee insures in respect of the contingency, and upon its happening receives the sum insured, it has been held, that, upon the bankruptcy of the debtor, the sum so recovered must be deducted from the proof, for an equity attaches upon it in the hands of the assignee as a trustee. (*b*) S. E. was indebted to C. E. and T. E., and being entitled in right of his wife to 400*l.* and upwards in the event of her surviving her mother, he and his wife assigned to C. E. and T. E. that contingent interest upon *trust* after payment of their costs and expenses, and to retain their debts, or as far as it would extend, and to pay the surplus, if any, to S. E. The debts owing to them respectively exceeded the amount of the contingent interest. After the execution of the deed, C. E. and T. E. at their own expense, and without the privity of S. E., effected policies of insurance in 200*l.* each on the life of the wife; the wife died, and C. E. and T. E. received the amounts of their respective insurances. Shortly afterwards a commission of bankruptcy issued against S. E., and C. E. and T. E., being both of them creditors of S. E. beyond the amount which it was the object of the assignment to cover, severally proved the *whole* of their debts under the commission, without noticing or deducting the two sums of 200*l.* each received upon the insurance, and this was a petition to expunge those sums from their proofs. In support of the petition, Godsal v. Boldero was cited. (*c*) The Vice-Chancellor (Sir T. Plumer)—" Upon the argument this case was assimilated to that of Godsal v. Boldero, of which it is the converse; here the party has recovered not his debt, but the value of the risk insured by his policy. But it is said, that inasmuch as in that case the transactions were blended,

An equity may attach in cases of trust.

(*a*) See Leeds v. Cheetham, 1 Sim. 146, ante, p. 82.
(*b*) Ex parte Andrews, 2 Rose, 410; 1 Mad. 572, S. C.
(*c*) 9 East, 72, ante.

payment by the executors absolving the office, so, e converso, payment by the office discharges the debt; it does not, however, necessarily follow, from the Court deciding that the party, having been paid by the executors, could not recover from the office, it could not recover from the executors. The contract with the insurance office is a contract of indemnity, legal only as an indemnity commensurate with the interest of the insured. The contract is an indemnity from loss, and there was no loss; that case, therefore, though it bears upon this question, does not conclude it. Another point arises on the assignment, which must decide this case. The assignment has placed C. E. and T. E. in the situation of trustees. The bankrupt and his wife conveyed their contingent interest to them as *trustees* to act for them, with indemnity against expenses, and covenanting not to interfere, in short, expressly transferring their whole right and title. From the date of this instrument, the bankrupt and his wife could not themselves have insured in respect of their property: they no longer had an insurable interest. The trustees acting in part for themselves, in part for the bankrupt, do an act beneficial to both parties, at their own expense ameliorating the property, laying out money for the benefit of themselves and their cestui que trust. The result of the act is, that the estate is benefited 400*l.*—shall they be allowed exclusively to appropriate this benefit? It is clear that a trustee never can use to his own benefit the property committed to his trust; as in the common instance of the renewal of a lease. Although it appears that the lessee would not have renewed with the cestui que trust, yet the trustee making a contract for himself, and with his own money, cannot set up a title adverse to that he has undertaken to protect. That is not precisely the present case, because here the insured had an insurable interest; but they had it subject to all the jealousy with which the Court regards a trustee acting on the property for his own benefit. They never would have insured, unless the property had been assigned to them. The means, therefore, of acquiring the sum received from the

insurance office, originate with the bankrupt and his wife. They divest themselves of all dominion over it, by committing it to trustees. It is extremely difficult to maintain that they as trustees being allowed this payment, are not to account for it as an advantage made of fiduciary property, acquired partly by their own act and partly by the act of the bankrupt. Having thus by the act of the bankrupt been enabled to obtain part of their debt, they cannot prove the whole. They must account. Being allowed what they have expended, including the premium, the surplus must be deducted from the proof.

CHAPTER VII.

OF THE AGENTS.

MANY of the offices employ agents in the different provincial towns for the purpose of receiving proposals for policies of insurance. They are furnished with a table of rates of premiums, both ordinary and extraordinary, by which to form their computations; they are expected, from their local knowledge of the parties, to communicate any circumstances which may have weight with reference to the particular insurance in question, and to transmit the same to the office, together with the proposal, and other documents before noticed. (*a*)

Agents are usually called upon to execute a bond, with sureties to the office for the due fulfilment of the trust; their accounts are to be rendered at fixed periods, and the balance transmitted to the office.

The general doctrines of principal and agent will apply as between the offices and their agents.

(*a*) See p. 78.

CHAPTER VIII.

OF PROCEEDINGS IN ACTIONS ON POLICIES OF INSURANCE UPON LIVES.

THE general principles of proceedings on policies against fire are applicable to those on policies upon lives. (*a*)

Most of the offices issue their policies upon lives *under seal.* The following, however, is an outline of a declaration upon a policy of insurance made upon the life of a third person, *not under seal*, against the Atlas Society.

1. A recital of the policy. 2. The payment of the premium, if the death takes place beyond the year, covered by the premium usually acknowledged to be received in the body of the policy. 3. An averment of the *declaration* made before the execution of the policy, which is the basis of the contract, and referred to in the policy; sometimes this declaration is embodied in the policy, so as to become a condition precedent, and when this is the case, if the policy be recited, it may be unnecessary to aver the declaration specially. 4. An averment of the printed *proposals* issued by the office, and usually mentioned and referred to by the policy. 5. That the *declaration* was in all respects true. 6. That the party insuring was interested in the life of the assured to the amount of the sum insured. 7. The death of the party assured, and satisfactory proof thereof produced to the company. 8. That although the plaintiff has kept and observed all the conditions and stipulations, and although the funds of the company are sufficient to

Declaration upon a policy not under seal.

(*a*) See the same, p. 88.

pay, and the three months (*a*) are elapsed, and the said (defendants) were requested to pay, yet that they neglected and refused to do so. A second count may contain counts for money had and received, account stated, and breach. (*b*)

Few instances are known of offices declining to pay, unless they have strong suspicions of gross fraud having been practised upon them, and it has been generally found, that those attempts are most frequent in the case of policies made upon the lives of third persons. But where a person in duty to his family or connections thinks fit to insure his own life, for a sum of money payable to his personal representatives or to trustees, it must require a very strong case to justify an office in resisting; and to their honour it may be said, that the cases are very rare indeed, in which they have driven executors, administrators, or trustees, to resort to an action.

The following is an outline of a declaration made upon a policy under seal, upon the life of a third person, against the Royal Exchange Company.

1st. Recital of the policy. 2d. Interest of the party insuring in the life of the insured to the amount of the sum insured. 3d. That at the time of making the insurance the party insured was in good health, and did not exceed the age of , and that afterwards and within the space of after making the said instrument, to wit, on, &c. at, &c. the said insured died; that he did not in his lifetime (do any of those acts whereby, according to the conditions of the policy, the same was to become void). 4th. Notice of his death to the company. 5th. That although sufficient proof was made to the satisfaction of the company of the death of (the insured), and although the party insuring had performed all the conditions required of him, yet that the said company did not within three months pay the

(*a*) The offices usually reserve to themselves the right to pay *within* three or six months.

(*b*) See 3 Chit. on Pleading, 102.

(party insuring) the sum of £ , or any part thereof, but have refused and neglected to do so. Conclusion, breach of covenant.

Recovery back by an office of a sum paid upon a policy effected under circumstances of fraud.

A recent case has occurred in which the trustees and directors of the Promoter Assurance Company recovered back from the assignee of a policy a sum of money paid to him by the office, the policy having been effected under circumstances of fraud, and the assignment not being bonâ fide. (*a*)

(*a*) Lefevre and others v. Royle, K. B. Dec. 9, 1813; and see ante, p. 95.

CHAPTER IX.

ON THE APPLICATION OF LIFE INSURANCE TO FORMING ENDOWMENTS, AND MAKING PROVISION FOR FAMILIES, AND FOR SECURITY OF DEBTS.

1. *Where the Income terminates with Life.*
2. *Where the Income is to be transmitted to an Individual of a Family.*
3. *Where the Sum insured is to be paid to a Parent on a Child attaining a certain Age.*
4. *Where the Life of a Child is insured, to whom an Advance has been made.*
5. *Where the Creditor insures his Debtor's Life.*
6. *Insurance Money settled upon Marriage.*
7. *Insurance for the purpose of meeting Fines, &c. payable on the Dropping of a Life or Lives.*
8. *Insurance by way of Security on an Annuity Transaction.*

A FEW observations upon the practical uses of Life Insurance, with such remarks on the legal bearings of the subject as occur, may not be misplaced in a work of this nature.

Where the income of the parent terminates with his life.

1. The system of life insurance, if judiciously and prudently applied, is of invaluable use in enabling a parent to provide for a family, when his income principally depends upon his own life or exertions, as in the case of professional men, traders, annuitants, and persons holding places or pensions.

Where the income of the parent is to be

2. Where although the income arising from property may be transmitted to one or more of his children after

him, there may be danger that others of his children may be inadequately provided for, as in the case of tenant for life, with remainder to the eldest son in fee or in tail, in which cases, although there is generally a provision for raising portions for younger children, yet frequently to an amount very inadequate to the support of the younger branches in those habits in which they have been brought up in common with the elder son. In such a case, a father, tenant for life, can, by a moderate curtailment of his expenditure to a fixed limit within his income, make a much more ample provision in ordinary circumstances, than he would be likely to do, unless very diligently careful, by investing in the funds or other securities the same amount of savings from his income: and for this reason, that individuals in general in their savings operate by *simple* interest, whilst life insurance companies work by *compound*. Besides which advantage, by the practice of those offices where a division of profits is made, considerable additions are frequently made, by way of bonus, to the sum insured, to an extent which the insured never contemplated. The difference between individual saving and the working of an insurance office will appear by the following simple statement, and without taking the bonuses into calculation: supposing a man of thirty to save 200*l.* a year until he is sixty, which is somewhat more than he is entitled to expect, according to the ordinary calculations of human life, he will have accumulated only 6000*l.*; but according to the average rate of premiums paid at most offices, a man of thirty can for about 2*l.* 10*s.* insure 100*l.*; and, therefore, by the payment of a premium of 200*l.* will at once entitle those whom he may select to receive 8000*l.* even if he should die the next day after insuring; but if he should live to the average limits of human life, he will be entitled then to receive, not only that sum, but also an addition by way of bonus, which has been known to be more than equal to the sum insured. As before observed in a preceding chapter, where the proceeds of a policy of insurance, together with all sums of money, bene-

transmitted to a particular individual of his family.

Difference between the savings of an individual and the operations of an insurance office.

fits, and advantages to arise or accrue upon it, (*a*) are settled or given by will, the parties interested will take the proceeds, together with the proportionable share of bonus or accumulation.

Insurance money payable to the parent on a child's attaining a certain age.

3. A parent may insure a sum of money to be paid to himself in the event of a child (or one or more children) attaining twenty-one, or any given age at which it is probable that a sum of money may be requisite for the purpose of advancing the child in life. Here the objection sometimes made against life insurance is obviated, that the insured has not the satisfaction of reaping the benefit of his frugality himself, for by this operation he is enabled to see his family provided for in his lifetime.

Insurance upon a child's life upon an advance made to him.

4. So where a parent may have advanced any sum of money to a child, either by way of provision, or to establish him in any trade or business, he may properly treat such an advance as a debt, and secure himself from the loss which would arise by the premature death of the child, by insuring the child's life to the amount of the sum advanced.

Creditor insuring debtor's life.

5. The case of a creditor insuring his debtor's life is so obvious, and has been in a preceding chapter so far considered as to its legal bearing, that it is almost unnecessary to enter into it. (*b*) It may however be observed, that where the debt depends alone upon the personal security of the debtor, as is generally the case when the creditor insures, it is the most effectual security the creditor can have under the circumstances; as he then depends, not only upon the personal credit of the debtor, but he has also the benefit of his own care and caution; for if the debtor fail to pay the premiums, the creditor may upon his failure keep up the policy; and even if the debt be paid, he may still practically, although not legally, have the benefit of the policy, if he chooses to keep it on foot; for although by the statute, the interest of the creditor ceasing

(*a*) Courtney v. Ferrers, 1 Sim. 137. (*b*) See ante, p. 124.

by payment of the debt, he cannot recover, yet as the offices never take the objection in a bonâ fide case,(*a*) he may still treat the policy as a valuable and saleable security.

To compel borrower to insure where legal interest only is paid on the loan does not appear to be usurious.

Where a party advances a loan of money to another upon the security only of an estate for the life of the borrower, at legal interest, there appears to be no objection to his compelling the borrower to insure his life, and pay the premiums, for the lender does not thereby "take directly or indirectly" more than legal interest; the borrower by insuring only secures the principal to the lender, in case of his death, the only security which he may have the means of giving. "Thus too," observes Blackstone,(*b*) "on a loan, if the chance of repayment depends on the borrower's life, it is frequent (besides the usual rate of interest) for the borrower to have his life insured till the time of repayment, for which he is loaded with an additional premium suited to his age and constitution. Thus if Sempronius has only an annuity for his life, and would borrow 100*l.* of Titius for a year; the inconvenience and general hazard of this loan, we have seen, are equivalent to 5*l.* which is therefore the legal interest; but there is also a special hazard in this case, for if Sempronius dies within the year, Titius must lose the whole of his 100*l.* Suppose this chance to be as one to ten, it will follow that the extraordinary hazard is worth 10*l.* more, and therefore that the reasonable rate of interest in this case would be 15 per cent.; but this the law, to avoid abuses, will not permit to be taken: Sempronius therefore gives Titius, the lender, only 5*l.* for legal interest; but *applies to Caius, an insurer, and gives him the other* 10*l. to indemnify Titius against the extraordinary hazard.*"

The principle upon which it has been held usury for the grantee of an annuity to compel the grantor to insure and pay the premiums is different. There the grantor pays annuity interest instead of legal interest; a contract, therefore, compelling him to keep up insurance at his own expense, would be in effect a contract to pay 10 or 15 per

(*a*) See ante, Barber v. Morris. (*b*) 3 Bla. Com. 459.

cent. for a loan of money, without any hazard of the principal. The principle of an annuity is, that the principal money is gone, the yearly payment of the annuity being the compensation for it.

Insurance made upon marriage and the insurance money settled.

6. It is not unusual for persons about to marry, amongst other modes of provision for a family, to covenant with the trustees to insure their lives to a certain extent: the objects and proportions in which the sum insured is to be distributed, at the death of the party, are pointed out by the trusts of the settlement. In such cases, however, it is the safer course that some property should be assigned to trustees to enable them to pay the premiums in case the insured should make default. It may be observed, on the other hand, that great care and consideration are requisite, before any person is induced, either from conscientious motives or the cupidity of others, to covenant with third persons to insure. In the case of marriage settlements, where trustees are interposed on the behalf of the married lady and her issue, as neither a married woman nor infants under age are capable of giving any legal consent, and trustees are bound by their duty to enforce the performance of the covenants, not only in behalf of the lady, but the issue which may be born; they have no power to modify or adopt the amount of insurance to the circumstances of the parties, after the covenants are once entered into, and the marriage has taken effect. A person then who has been unadvisedly induced to covenant to insure to a large amount, may find that in the contingencies of life, he has no longer the disposable income he contemplated, and therefore may be utterly unable to keep up his insurance, whilst at the same time the trustees, from the danger of future responsibility to the parties interested in the settlement are driven unwillingly to the necessity of attempting to enforce the contract, an attempt which cannot fail to be productive of great inconvenience, or ruin, to the party insured, as well as to the family prospectively provided for. A case has

occurred in the author's experience, shewing how very harshly this mode of settlement might operate to the parties more immediately interested, if improvidently entered into, that is to say, unless a party covenants to insure for such an amount, and such only as he has a moral certainty, after making every allowance for the ordinary expenditure of a family, and the possible decrease of his income, that he can conveniently provide the premiums. A gentleman, upon his marriage with a lady of considerable fortune, in consideration of that fortune, &c., covenanted with the trustees to insure his life for 20,000*l*; the interest thereof at his death to be paid to the lady for life, and after her death the principal to be paid to the children, subject to a power of appointment, and he also conveyed certain real estates to the trustees of larger annual value than the premiums amounted to, in trust to pay the premiums out of the rents and profits in case he should make default. In course of time, he became embarrassed in his circumstances, and the trustees found it necessary to enter upon the estates for the purpose of paying the premiums, the rents and profits of these estates, in the mean time, had become so reduced as to be barely sufficient to pay them. The husband lived apart from his wife, and there were no children of the marriage; neither husband or wife had any property remaining but the trifling surplus of the rents and profits of the real estate, after payment of the premiums of insurance. The husband had also by the settlement covenanted with the trustees to allow his wife an annuity by way of pin money, with which the estates conveyed were also charged, and there was no appearance upon the deed that the keeping up of the insurance was of primary obligation. Upon a bill filed for the administration of the trusts, the Vice-Chancellor, willing to relieve where opportunity offered, made a declaration that the keeping up the insurance, and the payment of the annuity, was of equal obligation upon the trustees, and referred it to the Master to inquire and state which of the policies of insurance, and

to what amount ought to be cancelled or disposed of, and ordered that so much of the rents and profits as were not necessary for keeping up the rest of the policies, should be paid to the wife on account of the annuity. If, however, this annuity had not been settled, the trustees would have had no alternative but to keep up the insurances for the benefit of children not in existence, and of the wife, who was thus placed in the unnatural situation of being compelled to look to the death of her husband, as the only means of extricating her from poverty. (*a*) Nor is it easy to see how any jurisdiction, short of that of parliament, could have relieved the trustees from their duty, if it had been imposed upon them by the trusts of the settlement.

Insurance for the purpose of meeting fines, &c. payable on the dropping of one or more lives.

7. In all cases where a fine, foregift, or other pecuniary advance has been made upon a lease determinable upon a life or lives, insurance upon the life, or the survivor of the lives, where more than one, is usefully applied; so if a fine is payable upon the renewal of a lease granted for a life, or two or more lives, an insurance for the purpose of covering the fine when payable is desirable, and is a convenient form of spreading over a larger surface a sum which might be with difficulty raised at once, and at some unexpected point of time. It appears also essentially necessary, where a tenant for life is desirous of raising money upon mortgage of his life interest, as without it, the lender may the next day be deprived of his security, although the more usual practice in such cases is to raise the sum by annuity, and make the life estate a security.

8. When money is raised by the grant of an annuity there is in general a stipulation in the deed that the grantor shall appear at some insurance office to be insured; as before observed (*a*), if the grantor were compelled to stipulate to pay the premiums, the whole transaction might be en-

(*a*) F—— v. W——, June, 1830, Vice-Chan. MS. (*b*) See ante, p. 127.

dangered on the ground of usury; for thus the principal would no longer be hazarded, at the same time that annuity interest instead of legal interest would be payable; but the grantee in general virtually imposes upon the grantor the burthen of insurance by purchasing his annuity at such a rate, as compensates for the payment of the premiums of insurance by himself. From the peculiar nature of annuity transactions, there is no contract, with reference to which insurance becomes so necessary; because in general, few will resort to borrowing money upon annuity who have any security to offer, by which to raise money at the usual and legal rates of interest. Annuities, from their nature, are exempt from the statutes respecting usury, because in these transactions, not only the interest, but the principal also is by the terms of the contract (*a*) in hazard. If the principal be secured by the terms of the contract, without reference to the possible insolvency of the borrower, any device to receive more than legal interest will be usurious. (*b*) Interest has been considered as a premium upon the *forbearance* to sue for the debt, and our idea of usury in this country is founded upon that principle. (*c*) Although an annuity may be purchased for a very inadequate price, yet the transaction does not appear to be illegal, unless there be fraud, oppression, undue influence, or other circumstances which might induce a court of equity to interfere. It was found, from the circumstance that few, but very necessitous persons, would resort to a mode of raising money, in which there was no restriction as to terms but the conscience of the lender, and where, on the other hand, from the situation of the borrower, not very many were disposed to lend but the speculative or unprincipled, that great frauds had been practised. These frauds were the more gross and exorbitant, because both parties were usually desirous that the transaction should be secret. The credit of the borrower and the character of the lender might

Insurance by way of security on the grant of an annuity.

(*a*) Nurse v. Wilson, 5 T. R. 353.
(*b*) See Chesterfield v. Janssen, 1 Atk. 340; 2 Ves. 142.
(*c*) Nurse v. Wilson 3 T. R. 353.

equally suffer by notoriety. The legislature therefore were compelled at length to interfere, not by putting a direct check upon the practice, but with the view, by rendering publicity necessary, indirectly to put an end to it. It has now been rendered necessary that a memorial of the particulars of all such transactions, together with the names of all parties, should be enrolled in Chancery.

PART III.

LAW OF ANNUITIES.

CHAPTER I.

ON ANNUITIES FOR LIVES.

General nature of an annuity.

1. An annuity is defined by Lord Coke to be "a yearly payment of a certain sum of money granted to another in fee for life or years, charging the person of the grantor only."(*a*) But it is not within the scope of this work to treat particularly of any other annuities than such as are granted for life or lives, or for a term of years determina-

(*a*) Co. Lit. 144.

ble on a life or lives, and as are embraced in stat. 17 Geo. 3, c. 20, and stat. 53 Geo. 3, c. 141. Those statutes include not only *annuities*, but *rent charges*, and the distinction, though sometimes confounded, is this, that a *rent-charge* is a burthen imposed upon and issuing out of *lands*, whereas an annuity is a yearly sum chargeable only upon the person of the grantor in the first instance, (*a*) though sometimes also collaterally secured upon land. A rent-charge may be an annuity, although an annuity cannot be a rent-charge; for if a person, intending to grant a rent-charge, do it in such a manner as to be void as a rent-charge, as if the land upon which it is charged do not belong to the grantor, yet the grant may be good as an annuity. (*b*)

Distinction between a rent-charge and an annuity.

The principle of a bonâ fide annuity transaction is very clearly laid down by Blackstone. (*c*) "The practice of purchasing annuities for lives at a certain price or premium, instead of advancing the same on an ordinary loan, arises usually from the inability of the borrower to give the lender a permanent security for the return of the money at any one period of time. He therefore stipulates (in effect) to repay annually during his life some part of the money borrowed, together with legal interest for so much of the principal as annually remains unpaid, and an additional compensation for the extraordinary hazard run, of losing that principal entirely by the contingency of the borrower's death."

A bonâ fide annuity not subject to the usury laws.

2. If an annuity transaction be really such, and not a mere device for obtaining more than legal interest, there does not appear to be any authority, under which such a transaction can be affected with *usury*. "Supposing," says Mr. Justice Burnet, in Chesterfield v. Janssen (*d*), "there is a purchase of an annuity at ever such an under price, if the bargain *really* was for an annuity it cannot be usury, but if the communication was about *borrowing* and *lending*, it may be usury within the statute: and how? if by reason of

(*a*) Co. Lit. 144.
(*b*) Bro. Abr. Grauntes, pl. 4.
(*c*) 2 Bla. Com. 461.
(*d*) 2 Ves. sen. 142; 1 Atk. 340.

all the circumstances and of the communication, the exility of the sum given, the *original contract* being a *borrowing* and *lending*, the Court thinks the annuity was a mere device to pay the principal with usurious interest, to evade the statutes, this will be within the statute, though on the face of the bargain, it appear ever so fair a sale of an annuity."

The real value of an annuity must depend upon the age, constitution, situation, and habits of the borrower; it is therefore extremely difficult to lay down any precise rule of value. In the case of Murray v. Harding, (*a*) where the question was very fully considered, it was held by the Court of Common Pleas, that an annuity at six years' purchase for the life of the grantor, then of the age of thirty-two, with a *clause for redemption*, at the *option of the grantor*, after *the expiration of five years*, for *five years and a half's* purchase, was not usurious. This case is the stronger, as it was recited in the annuity deed that the agreement had been made for a *loan* of the money, which was paid as the consideration of the annuity; but it having been made to appear to the Court that this recital was introduced by the attorney without the privity of the client, who really meant to purchase an annuity, the Court held that this inaccuracy in the recital should not vitiate a contract which otherwise seemed to be a fair one.

In general an annuity is not liable to be set aside for inadequacy of price.

3. Nor does it appear, upon consideration of the authorities, that a court of equity will set aside an annuity transaction for mere inadequacy of price, unless it appear to be so gross and glaring as to render the transaction fraudulent.

In Heathcote v. Paignon (*b*) Lord Thurlow says:— "If mere inadequacy is the ground of rescinding the contract for an annuity, it should seem that it was scarcely sufficient; but there is a difference between that and *evidence arising from inadequacy*. If there be such inadequacy as to show that the person did not *understand* the bargain he made, or was so *oppressed* that he was glad to make it, knowing its inadequacy, it would show a command

(*a*) 2 Bla. Rep. 359; 3 Wils. 390. (*b*) 2 Bro. C. C. 175.

over him which amounts to a fraud." The cases of Heathcote v. Paignon and Chesterfield v. Janssen, appear to indicate the principle, therefore, that although mere inadequacy of price may not be sufficient to set aside a transaction, yet if there appear to be any *fraud*, direct or constructive, according to the rules of a court of equity, which, with reference to the particular circumstances or the situation of the grantor, affords a ground for relief, there the Court will interpose, and set aside the transaction.

In Heathcote v. Paignon, Lord Thurlow affirmed the decree of the Master of the Rolls, setting aside an annuity of 50*l.* a year, granted by a man of thirty years of age for his own life, in consideration of 200*l.* Evidence of the market price of the annuity was gone into, and it appeared, from the evidence of one witness, that the market price under the circumstances was from five to six years' purchase, and of another witness about ten years' purchase, and the Master found that the value of the annuity was ten years' purchase.

It may be observed, that in this case, great as the inadequacy was, the decree of the Master of the Rolls uses the following language:—" That John Paignon, the purchaser of the annuity, &c. *taking advantage* of the *said plaintiff's distress*, purchased the same under the market price."

In Ex parte Thistlewood, (*a*) Lord Eldon, who argued the case of Heathcote v. Paignon, for the representatives of Paignon, the grantee, observed, " That when he pressed upon Lord Kenyon that it was not the intention of the parties to deal at the market price, and that therefore a valuation afterwards, with reference to the market price, was upon quite a different ratio from that which the parties agreed to apply to their contract, he would not listen to the doctrine." His lordship added, " The case afterwards went before Lord Thurlow, and I must say I regret that he decided as he did, without saying whether he would apply the market price or not, stating that the exception did not compel him to decide that question."

(*a*) 19 Ves. 247; 1 Rose, 306.

Mode of setting a value on an annuity in bankruptcy.

The rule, as established in bankruptcy by Ex parte Whitehead, (*a*) under stat. 49 Geo. 3, c. 121, s. 17, was, that the original price given for an annuity, with the variation arising from the lapse of time since the grant, is, where there are no peculiar circumstances in the case, the value to be proved; and although the valuation in Ex parte Thistlewood was, from peculiar circumstances, taken as it existed at the time of the bankruptcy, yet Lord Eldon declared that the decision was made upon the particular circumstances of the case.

The present statute of bankruptcy, 6 Geo. 4, c. 16, adopting the doctrine of Ex parte Whitehead, expressly enacts, by s. 54, that the commissioners, in ascertaining the value of an annuity, are to have regard "to the original price given for the annuity, deducting therefrom such diminution in value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the commission;" and the Insolvent Act (7 Geo. 4, c. 57, s. 51,) uses the same language with respect to annuities granted by insolvents. The former statute of bankruptcy (49 Geo. 3, c. 121,) only directed the commissioners to ascertain the value, without pointing out the rule to guide them. In Griffith v. Spratley, (*b*) the Court of Exchequer unanimously held, that mere inadequacy of price was not sufficient to set aside a contract; and Lord Chief Baron Eyre places the determination of the Master of the Rolls and Lord Thurlow in Heathcote v. Paignon, to be upon the ground that the inadequacy was so gross and revolting, that nobody could suppose such a bargain to be made by a person *in possession of himself.*

In such a case, therefore, the ground for the interposition of a court of equity, is that of *fraud.* (*c*).

The clause for redemption does not make the transaction usurious.

4. The opinion was formerly very generally entertained, that a clause for redemption made an annuity transaction

(*a*) 1 Mer. 10, 127. (*b*) 1 Cox, Cha. Ca. 383.

(*c*) See Gartside v. Isherwood, 1 Bro. C. C. 558; Coles v. Trecothick, 9 Ves. 234.

usurious. It was thought that a power of redemption was in some degree tantamount to a provision for repayment of the principal; (*a*) in which case, there can be no doubt, usury would exist, if more than legal interest were reserved. Thus in Lawley v. Hooper, (*b*) where there was a provision enabling the grantor to *purchase back*, upon giving six months' notice to the grantee, Lord Hardwicke, upon decreeing a redemption upon payment of the sum originally advanced with legal interest, considered this provision as affording evidence that a *loan* of money was intended, which was turned into the shape of an annuity for the sake of interest. Even so late as the case of Murray v. Harding, (*c*) Lord Chief Justice De Grey considered that a power of redemption, though only on one side, was a strong circumstance to show it a loan, though not conclusive.

As long as this opinion was entertained, it was usual either to insert the contract for redemption in a separate deed or writing, or executed as a mere understanding between the parties. That doctrine has, however, subsequently been exploded; the provision is, in truth, beneficial to the grantee. Even in Murray v. Harding it was so considered. In Irnham v. Child, (*d*) the question was raised before Lord Thurlow, whether, where an annuity had been granted, and agreed by parol to be redeemable, but the clause of redemption was, by the agreement of both parties, not inserted, under the supposition that such a clause appearing upon the deed would make the transaction usurious, a court of equity would decree redemption, upon the facts of the parol agreement. Parol evidence was offered in support of the parol agreement, but it was rejected, as not admissible to contradict or alter the deed, unless the omission had been charged to have been made by fraud. The case, however, is worthy of remark, on account of the declaration of Lord Thurlow upon the clause for redemption. He

(*a*) See Fountain v. Grimes, Cro. Jac. 252; 1 Bulst. 36.
(*b*) 3 Atk. 278, A.D. 1745.
(*c*) 2 Bla. Rep. 859; 3 Wils. 392.
(*d*) 1 Bro. Cha. Ca. 92.

there says,—" To sell an *annuity*, and make it *redeemable*, is *not usury*, because it is not a *loan*;" and the practice is now almost universal to make annuities redeemable by the grantor under the terms of the contract.

In what manner annuities are usually secured.

5. When the grantor grants the annuity for his own life, the usual practice is to compel him to secure it by bond and warrant of attorney, or by assignment of personal property, or by conveying real estate in trust, whether in possession, in reversion, absolute, or contingent, or by all these securities. It is not usual, however, for persons to raise money by annuity who have the means of giving any absolute security beyond a life interest.

Where secured upon real estate.

If the annuity is secured upon freehold or leasehold estates, in which the grantor has only a life interest, a power of distress and entry upon the premises, or for the appointment of a receiver in default of payment of the annuity at the times stipulated, may be inserted. If freehold, it may be demised to a trustee for a term of years, if the grantor should so long live, in trust, from time to time, by sale or mortgage, to raise money and pay off the arrears of the annuity. If the property be leasehold, the subsisting term may be assigned for the like purposes and trusts. If the annuity be for the life of the grantee or nominee, then, as the life estate of the grantor would not afford adequate security, an insurance to the amount of the purchase money appears to be useful as an additional security, either for the life of the grantor, the grantee, or the nominee or the longer liver of two or more nominees, as may meet the wishes of the grantor. If the property is copyhold, a covenant may be inserted in the deed for surrendering the copyhold to the grantee, with a condition for making void such surrender on payment of the annuity, and trusts may be raised for satisfying arrears out of the rents and profits, or by sale or mortgage. If, however, the surrender is taken at the time of executing the deed and the surrender is therein recited, the covenant becomes unnecessary. When the grantee has these securities, he

Where the security is copyhold.

usually agrees to permit the grantor to receive the rents until default be made in payment of the annuity. Upon which, or a limited time afterwards, he is to enter and distrain according to the terms of the deed, or, if necessary, he may bring ejectment, and if tenants are in possession he should give notice to them to pay over the rents and profits to him, or to such person as he may appoint.

Where the annuity is secured upon stock in the funds or other personal estate.

When the annuity is secured upon the dividends or interest of government or other funds, they may be assigned either to a trustee for the grantee or to the grantee directly, with power for the grantee to receive the same of the trustees or other persons who may have the legal estate in the funds, and to pay the surplus, if any, to the grantor. In the latter case, although the dividends or interest assigned may be of equal or greater value than the annuity, the transaction does not come within the exception of the statutes, so as to render a memorial unnecessary; there must be an actual transfer to meet this exception of the act. (*a*)

Notice to trustees is necessary.

Wherever the dividends or interest of funds standing in the name of trustees are assigned, it is of the utmost importance that notice should be forthwith given to the trustees, otherwise they are not bound to pay them to the assignee; and, moreover, if the grantor should assign the same funds to a third person for valuable consideration, that person, although the second incumbrancer, will, by first giving notice, gain a priority, supposing the latter transaction to be bonâ fide on the part of the second incumbrancer, and that he has no notice of the prior incumbrance. (*b*)

Annuities for the life of grantee or nominees.

An annuity for the life of the grantee, or of two or more persons to be nominated by the grantor, should be secured upon freehold estates in fee, or upon such at least as will be probably co-extensive in duration with the life of the grantee or of the longer liver of the nominees; for this purpose a mortgage may be assigned or transferred with

(*a*) See post.

(*b*) Dearle v. Hall, 3 Russ. 1; Loveridge v. Cooper, id. 30.

the usual powers. Insurance, as before noticed, is also a desirable mode of securing the purchase money of the annuity.

The pay or half-pay of officers in the army or navy cannot be assigned as a security.

6. It is now held that the pay or half-pay of an officer in the army cannot be assigned, so as to be a security for an annuity either at law or in equity.

The Courts formerly held a different opinion upon this subject. In Gomez v. Graham, (*a*) Lord Hardwicke treated the full pay of an officer in the army as assignable by way of security. In the next case, Stuart v. Tucker, (*b*) in the Common Pleas, which was a question whether half-pay was so assignable, Chief Justice De Grey took a distinction between pay and half-pay, the former being pro servitio impendendo, the latter pro servitio impenso, that pay, though assignable in equity, was not, being a chose in action, assignable at law; but he nonsuited the plaintiff, an officer, who had assigned his half-pay, and afterwards brought an action to recover it, thus intimating his opinion that half-pay was assignable. So also in Yates v. Elliott, and Spencer v. Cox and Drummond. (*c*)

The latter cases have, however, overturned this doctrine, and a more correct understanding of the nature of half-pay has been arrived at. It is not merely a reward pro servitio impenso, but "it is intended by the state to provide decent maintenance for experienced officers, both as a reward for past services and to enable them to preserve such a situation, that they may be always ready to return into actual service." (*d*)

Thus, in Flarty v. Odlum, in the Court of King's Bench, it was held by Lord Kenyon, (*e*) that the half-pay of an officer should not be included in the schedule delivered in under the lords' act. This case was followed by the case

(*a*) Cited in Stuart v. Tucker, 2 Bla. Rep. 1138.
(*b*) Id. ibid.
(*c*) Both cited in Stone v. Lidderdale, 2 Anstr. 335.
(*d*) Per Macdonald, C. B.; Stone v. Lidderdale, ubi supra.
(*e*) 3 T. R. 681.

of Lidderdale v. the Duke of Montrose and Lord Mulgrave, in which the point of assignment of half-pay again occurred; (*a*) and upon an attempt to render the assignment in the last mentioned case good in a Court of equity, though bad at law, Chief Baron Macdonald held, after an elaborate argument, such an assignment to be equally invalid in equity. (*b*)

If the half-pay be not assignable, it follows a fortiori that the full pay of an officer is not assignable, for thus he would be deprived of the means of maintaining himself in the service, for which purpose the pay is allowed him.

It need scarcely be observed, that the principle equally applies to the pay and half-pay of the navy.

A mode is pointed out under the insolvent act, 7 Geo. 4, c. 57, s. 29, whereby a portion of pay or pension of an officer of the army or navy may be obtained by the assignees for payment of the prisoner's debts; but, with this exception, it is declared that the assignee's power does not extend to the pay, half-pay, or pension of military or naval officers.

Benefices in the church not assignable.

7. It also appears that no legal assignment of the profits of a benefice in the church can now be made for the purpose of securing an annuity; for by the stat. 13 Eliz. c. 20, which, by its preamble, clearly points out the intention, it is enacted, " that all *chargings* of such benefices with cure hereafter with any pension or with any profit out of the same to be yielded or taken hereafter to be made, (other than rents to be reserved upon leases hereafter to be made according to the meaning of the act,) *shall be utterly void;* and although this statute, together with the explanations, additions, and alterations thereof, made by several statutes in the 14th, 18th, and 43d of Elizabeth, were repealed by stat. 43 Geo. 3, c. 84, s. 10, yet as by the subsequent stat. 57 Geo. 3, c. 99, s. 1, the stat. 43 Geo. 3, c. 84, is repealed, and so much *only* of the said acts of Elizabeth as relate to spiritual persons holding of farms, and to leases

(*a*) 4 T. R. 452.

(*b*) Stone v. Lidderdale, 2 Anstr. 341.

of benefices and livings, and to buying and selling, and to residence of spiritual persons on their benefices," are repealed, it would appear, that by the operation of the stat. 57 Geo. 3, c. 99, so much of the stat. 13 Eliz. c. 20, as relates to *chargings* of benefices, and also of another stat. 14 Eliz. c. 11, s. 15, concerning bonds, contracts, promises, and covenants for permitting any person to enjoy any benefice with cure, or to take the profits thereof, must stand revived and in full force. (*a*)

Under the insolvent act, 7 Geo. 4, c. 57, s. 28, the assignees may obtain sequestration of an insolvent clergyman's benefice or curacy, but they are not entitled under the act to the income of such benefice or curacy.

An annuity will be void where the consideration is immoral or against public policy.

8. When the consideration of an annuity is either ex turpi causâ, as in contemplation of future illicit cohabitation, (*b*) or against public policy, as in the case of a recommendation of a person to an office in his majesty's household by the party having the right of recommendation, in consideration of the former granting an annuity to a party to be nominated by the party recommending, (*c*) or where from the particular circumstances of the grantor, as mental imbecility, he is not competent to contract, there a Court of equity will rescind the transaction.

Bankruptcy of grantor of annuity, and of proof under the commission.

9. By stat. 6 Geo. 4, c. 16, s. 54, it is enacted, "That any annuity creditor of any bankrupt, by whatever assurance the same may be secured, and whether there were or were not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the commission."

(*a*) See White v. Bp. of Peterborough, 3 Swanst. 109, n.

(*b*) Harrington v. Du Chattel, 1 Bro. C. C. 125; and see Hartwell v. Hartwell, 4 Ves. 811; Osborne v. Williams, 18 Ves. 379.

(*c*) Gray v. Mathias, 5 Ves. 286; Hill v. Spencer, Ambl. 641; France v. Bolton, 3 Ves. 372.

It appears that under this act annuity creditors, like others, may decline to prove under the commission, and may sue the bankrupt if they choose, but the certificate is made a discharge from all claims of the annuitant in respect of the annuity. (*a*)

The original cases in bankruptcy considered the penalty of the bond securing the annuity, when forfeited before the bankruptcy, as the debt, not however to be received but to stand as a security for the annuity; and Lord Hardwicke's original rule was, that if there were sufficient assets the annuity should be paid half yearly, the debt giving a right to receive under the proof the annuity itself out of the assets, if the state of the assets permitted it, down to the death of the annuitant.

The course afterwards changed to setting a value upon the annuity to be proved as the debt, which Lord Hardwicke puts upon the convenience of distribution, (*b*) for if the annuity were to be received from time to time by the annuitant, there could be no final division during the annuitant's life.

The stat. 49 Geo. 3, c. 121, s. 17, first authorized a direct proof of annuities, and antecedently to that act, if the annuity was secured by a covenant only, the arrears only could be proved; if secured by bond and covenant and there had been no failure, nothing could be proved; but if a failure had occurred, there was this difference between a bond and a covenant, that under a covenant the arrears only could be proved, but under a bond forfeited before the bankruptcy, the value of the annuity, as well as the arrears could be proved; and this clause only provides, that in order to give the annuitant some proportion of the property, it is no longer necessary that there should have been a breach of the condition of the bond. (*c*)

(*a*) See sect. 55, and also sect. 121.

(*b*) Ex parte Thistlewood, 19 Ves. 245, per Lord Eldon; Ex parte La Compte, 1 Atk. 251; Ex parte Artis, 2 Ves. 489.

(*c*) Ex parte Thistlewood, 19 Ves. 245.

The mode of ascertaing the value of an annuity, as directed by the last bankruptcy statute, is consistent with the rule previously laid down by Lord Eldon in Ex parte Whitehead. (*a*) In Ex parte Thistlewood, indeed, a case of very special circumstances, Lord Eldon departed from this rule, permitting proof to be made upon a calculation with reference to the age and improved health of the annuitant, notwithstanding the value so ascertained exceeded the price originally given for the annuity, and the grantee had enjoyed the annuity for the space of two years, but Lord Eldon declared that the decision was made upon the special circumstances. It has however been held since by Sir J. Leach, Vice-Chancellor, in Ex parte Fisher, (*b*) that the commissioners are precluded by the 54th section of the last statute from taking into consideration the altered state of health of the annuitant. His Honour also held, that where the consideration for the annuity is not *money* but *property*, the price paid by the grantee for that property is not the criterion of the value, if such value be altered by accidental circumstances.

The altered state of health of an annuitant cannot now be taken into consideration.

In a case before Lord Loughborough, where proof was offered under bonds for securing an annuity, and was rejected on the old ground that there was no arrear at the date of the bankruptcy, and therefore that the bonds were not forfeited; and it appearing that the bonds were void under the annuity act from a defect in the memorial in one, and the non-enrolment of the other, the petition prayed that the petitioner should be admitted a creditor for the sums actually advanced by him. His lordship dismissed the petition on the ground that the petitioner having insisted on his securities at the date of the commission it was not the same debt. (*c*) In a later case, however, Ex parte Wright, (*d*) under similar circumstances, except that the creditor had not insisted on his security, Lord Eldon

Of proof where the annuity is defective under the statutes.

(*a*) 19 Ves. 557; 2 Rose, 358.
(*b*) 2 G. & J. 102.
(*c*) Ex parte James, 5 Ves. 708.
(*d*) 19 Ves. 255.

permitted the grantee to prove the balance remaining due of the money advanced.

Where the agents become bankrupt.

Agents will, in general, be presumed to receive the consideration money on account of their principals. In a case where A. purchased an annuity of B., through the agency of the bankrupts, and the consideration money was received by them as agents for B. and placed to B.'s account, it was held that A. could not prove the consideration paid unless the grant of the annuity was merely colourable, and contrived by the bankrupts for the purpose of obtaining A.'s money for their own use. (*a*)

Of proof where the grantor has secured the annuity by real securities.

When the grantor of an annuity has secured it on real property and becomes bankrupt, an order will be made that the real security be sold, and the produce applied in satisfaction of so much of the arrears and value of the annuity as the same shall extend to satisfy, and that the grantee be allowed to prove for the residue. (*b*)

A mere stipulation for payment of annual interest for forbearance on a sum of money cannot be proved as an annuity.

An *annuity* implies that the principal sum is gone for ever, and is to be satisfied by yearly periodical payments, therefore a mere stipulation for the payment of annual interest for the forbearance of a sum of money cannot be proved as an annuity. (*c*)

Surety of grantor of annuity bankrupt.

10. By the Bankrupt Act, 6 Geo. 4, c. 16, s. 55, it is enacted, that it shall not be lawful for any person entitled to any annuity granted by any bankrupt, to sue any person who may be collateral surety for the payment of such annuity, until such annuitant shall have proved under the commission against such bankrupt for the value of such annuity and for the *payment** thereof; and if such surety after such proof pay the amount proved as aforesaid, he shall thereby be discharged from all claims in respect of such annuity; and if such surety shall not (before any payment of the said annuity subsequent to the bankruptcy

* Sic. *arrears.*

(*a*) Ex parte Shaw, 2 G. & J. 106.

(*b*) Ex parte Key, 1 Mad. 426; Ex parte Slack, 1 G. & J. 346.

(*c*) Winter v. Mousley, 2 B. and A. 806-7.

shall have become due,) pay the sum so proved as aforesaid, he may be *said** for the accruing payments of such annuity until such annuitant shall have been paid or satisfied the amount so proved, with interest thereon, at the rate of four per cent. per annum, from the time of notice of such proof, and of the amount thereof, being given to such surety; and after such payment or satisfaction such surety shall stand in the place of such annuitant, in respect of such proof as aforesaid, to the amount so paid or satisfied as aforesaid by such surety; and the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant or of such surety in respect of such annuity, provided that such surety shall be entitled to credit on account with such annuitant for any dividends received by such annuitant under the commission, before such surety shall have fully paid or satisfied the amount so proved as aforesaid.

* Sic. *sued.*

It still appears rather questionable, whether, where the annuitant proves the value of the annuity and receives all the dividends obtainable upon such proof, and then comes upon the surety for the deficiency after the bankrupt has obtained his certificate, the certificate will discharge the bankrupt from the claims of the surety, because if the annuitant avails himself to the extent of his proof, without giving notice to the surety, or making any claim against him until after a final dividend is declared, the surety will have no opportunity of proving under the commission, and upon this point might arise the question, whether, to entitle himself to any claim against the bankrupt, he is bound to take immediate notice of the annuitant's proof, and pay the amount so proved; for it may be observed, that under the 55th section, the annuitant does not appear to be bound to give notice to the surety of his proof, except for the purpose of entitling himself to interest from the surety upon the sum proved. (*a*)

(*a*) See Watkins v. Flanagan, 1 Bing. 413; 3 B. & A. 186; 1 G. & J. 199. Welch v. Welch, 4 M. & S. 333. And see 1 Deacon's Bankrupt Law, 232.

Of the surety in general.

11. Where a party unconnected with the grantor, and for a separate consideration, guarantees the payment of an annuity, that is an assurance not necessary to be enrolled; (*a*) and where a surety to an annuity had charged his own freehold estate of greater value than the annuity, in trust to pay the annuity, if in arrear, it was held, that he was a grantor within the exception, s. 8, of 17 Geo. 3, and that a memorial thereof was not requisite. (*b*)

Where the agent makes advances, his right as against the surety.

Upon the grant of an annuity the agent between the grantor and the grantee was made trustee and receiver, and afterwards, upon the faith of the securities, advanced out of his own funds several sums on account of the annuity, and received commission afterwards. The grantor failed, and the securities fell short; and it was held, that the agent could not treat the advances as *loans*, and *resort to the surety*. The surety was discharged to the extent of the sums received on account of the annuity. (*c*) So where annuity agents had become bankrupts, and had in their accounts and pass-book given the grantor credit for sums as received on account of annuities, it was held, they could not afterwards retract; but where sums had been entered to his credit, but accompanied with a minute "not received," and where other sums were originally credited, but as to which evidence was given of his subsequent assent to their being replaced to his debit, it was held, that the assignees were entitled to withdraw them from his credit and be allowed them in the account. (*d*)

Rights as between surety and co-surety.

A. one of the sureties of an annuity, by arrangement with the assignee of the annuity, became entitled, after payment of a certain sum of money, to receive the annual payments; and it was held, that as between the sureties the annuity was to be deemed as subsisting, and not to release the other co-sureties from liability to contribute; nor

(*a*) Sandilands v. Marsh, 2 B. & A. 673.
(*b*) Darwin v. Lincoln, 5 B. & A. 444.
(*c*) Williamson v. Gould, 1 Bing. 171.
(*d*) Shaw v. Dartnall, 6 B. & Cr. 56. And see Shaw v. Woodcock, 7 B. & Cr. 73.

was the liability varied by the fact, that stock originally assigned as a further security for the annuity, by a deed between A. and B. the assignee, was ultimately to revest in A. (*a*)

It was also held in the same case, that where one of the three co-sureties paid money on account of the annuity, after the bankruptcy of a co-surety, that the other was liable to an action of contribution, although he had obtained his certificate, inasmuch as one surety could not prove the value of the annuity under the commission against his co-surety; but that he could not at *law* be compelled to repay more than one-third of the sum paid on account of the annuity, although the third surety had become insolvent at the time of such payment. In equity it has been held, that one of three co-sureties having become insolvent, the one who has paid may recover the moiety against the other who is solvent. (*b*)

Stamp duties.

12. The following are extracts from stat. 55 Geo. 3, c. 184, so far as relates to duties on instruments connected with annuities.

Releases and conveyances of annuities are exempted from ad valorem duty on repurchase.

S. 31. The releases and other conveyances of annuities or rent-charges made in the original grant thereof, subject to be redeemed or repurchased, shall, on the repurchase thereof, be exempted from the ad valorem duty hereby imposed on conveyances on the sale of any property, and shall be charged only with the ordinary duty on deeds or instruments of the like kind not upon a sale.

Sched. p. 1. *Bond* in England, and personal bond in Scotland, for the payment of any *definitive and certain sum* of money, an ad valorem duty.

Bond in England, and personal or heritable bond in Scotland, given as the *only* or *principal* security for the payment of any annuity, upon the original creation and sale thereof. (See Conveyance of Lands, post.)

Bond in England, and personal bond in Scotland, given as a collateral or auxiliary security for the payment of any

(*a*) Browne v. Ley, 6 B. & Cr. 689. (*b*) Peter v. Rich, 1 Cha. Ca. 34.

annuity, upon the original creation and sale thereof, where the same shall be granted, or conveyed, or secured, by any other deed or instrument liable to and charged with the ad valorem duty hereafter imposed upon the sale of any property, 1*l.*

Bond in England, and personal or heritable bond in Scotland, given as a security for the payment of any annuity, (except upon the original creation and sale thereof,) or of any sum or sums of money at stated periods, (not being interest for any principal sum, nor rent increased or payable upon any lease or tack,) for any definite and certain term, so that the total amount of the money to be paid can be previously ascertained, the same duty as on a bond of the like nature for the payment of a sum of money equal to such amount for which an ad valorem duty is payable.

Bond in England, and personal and heritable bond in Scotland, given as a security for the payment of an annuity, (except as aforesaid,) or of any sum or sums of money at stated periods, (not being interest for any principal sum, nor rent reserved or payable upon any lease or tack for the term of life, or any other indefinite period, so that the whole money to be paid cannot be previously ascertained,) ad valorem.

General Directions respecting Bonds.—When any bond as aforesaid, together with any schedule, receipt, or other matter put or indorsed thereon, or annexed thereto, shall contain 2160 words or upwards, there shall be charged for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further progressive duty of 1*l.* 5*s.*

And when any such bond as aforesaid shall be given as a security for the payment of a sum of money, and also of a share in any of the stocks or funds before mentioned, or an *annuity*, or both, or for the payment of an *annuity*, and also of a share in any of the said stocks or funds, the proper ad valorem duty shall be charged in respect of each.

And where any such bond as aforesaid shall be given as a security for the payment or transfer to different persons,

of separate and distinct sums of money, or *annuities*, or shares in any of the stocks or funds before mentioned, the proper ad valorem duty shall be charged in respect of each separate and distinct sum of money, or *annuity*, or share in any of the said stocks or funds therein specified and secured, and not upon the aggregate amount thereof.

And where any bond in England shall be given as a security for the performance of any covenant or agreement for the payment or transfer of any sum of money, or *annuity*, or any share in any of the stocks or funds before mentioned, such bond shall be charged with the same duty as if the same had been immediately given for the payment or transfer of such money, or *annuity*, or share of the said stocks or funds.

And where in England any bond for the payment or transfer, or for the performance of any covenant for the payment or transfer, of any sum of money, or *annuity*, or any share in any of the stocks or funds before mentioned, shall be contained in one and the same deed or writing with any other matter or thing in this schedule specifically charged with any duty, (except any declaration of trust of the money, annuity, stock or fund secured,) such deed or writing shall be charged with the same duties as such bond and other matter or thing would have been charged with if contained in separate deeds.

But where in England a bond for the performance of covenants or agreements, (other than for the payment or transfer of any sum of money, or *annuity*, or any share in any of the said stocks or funds,) shall be contained in the same deed or writing with any other matter or thing, the same shall not be charged separately, but the whole shall be considered as one deed, and be charged accordingly under its proper denomination.

Conveyance, whether grant, disposition, lease, assignment, transfer, release, renunciation, or of any other kind whatsoever, upon the *sale* of any lands, hereditaments, rents, *annuities*, or *other* property, real or personol, heritable or moveable, or of any right, title, interest, or claim in,

to, out of, or upon any lands, tenements, rents, *annuities*, or other property; that is to say, for and in respect of the principal or only deed, instrument, or writing, whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to, or vested in the purchaser or purchasers, or any other person or persons, by his, her, or their direction, ad valorem.

And where *upon the sale of any annuity or other right*, not before in existence, the same shall not be granted by actual grant or conveyance, but shall only be secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument by which the same shall be secured, or some one of such instruments, if there be more than one, shall be deemed and taken to be liable to the same duty as an actual grant or conveyance.

And where there shall be several deeds, instruments, or writings, for completing the title to the property sold, such of them as are not liable to the said ad valorem duty shall be charged with the duty to which the same may be liable under any general or particular description of such deeds, instruments, or writings contained in this schedule.

Deed of any kind whatever *not otherwise* charged in this schedule, nor expressly exempted from all stamp duty, 1*l.* 15*s.*

And where the same, together with any schedule, receipt, or other matter,(*a*) put or endorsed thereon or annexed thereto, shall contain 2160 words or upwards, then for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further progressive duty of 1*l.* 5*s.*

Memorial to be registered or enrolled pursuant to act of parliament, of any deed or instrument, deeds or instruments, whereby any *annuity* shall be granted or secured in England, 1*l.*

(*a*) An endorsement on an annuity deed containing a clause of redemption, if made subsequent to execution of it, must be stamped, otherwise it cannot be received in evidence. Schumann v. Whetherhead, 1 East, 537.

And for every piece of vellum, parchment, or paper, upon which any such memorial shall be written, after the first, a further progressive duty of 1*l.*

Warrant of Attorney, (with or without a release of errors,) to confess and enter up a judgment in any of his Majesty's Courts at Westminster, or in any of the Courts of Great Sessions in Wales, or of the counties palatine of Chester, Lancaster, and Durham, which shall be given as a security for the payment of any sum or sums of money, or for the transfer of any share or shares in any of the government or parliamentary stocks or funds, or in the stock and funds of the Governor and Company of the Bank of England, or of the East India Company, or of the South Sea Company, the same duty as on a bond for the like purpose; save and except when such payment or transfer shall be already secured by a bond, mortgage, or other security, which *shall have paid* the ad valorem duty on bonds or mortgages imposed in this schedule, or by the act of the 44th or 48th of Geo. 3.

CHAPTER II.

CONSTRUCTION OF THE STATUTES CONCERNING ANNUITIES.

1. *A Memorial to be enrolled.*
2. *Every Deed, &c. granting an Annuity, to be enrolled.*
3. *Contents of Memorial.*
4. *The Witnesses.*
5. *The Consideration.*
6. *The Exceptions of the Acts, where no Memorial is necessary.*

A memorial to be enrolled.

1. By the first of the statutes(*a*) upon the subject of annuities, (17 Geo. 3, c. 26,) it is directed, "that a memorial of every deed, bond, instrument, or other assurance, whereby an annuity or rent charge shall, after the passing of the act, be granted for one or more life or lives, or for any term of years, or greater estate, determinable on one or more life or lives, shall within twenty days after the execution of such deed, &c. be enrolled in Chancery; every such memorial shall contain the day of the month and the year when the deed, &c. bears date, and the names of all the parties, and for whom any of them are trustees, and of all the witnesses; and shall set forth the annual sum or sums to be paid, and the name of the person or persons for whose life or lives the annuity is granted, and the consideration or considerations of granting the same, otherwise every such deed, &c. shall be void."

(*a*) Although this statute has been repealed by the more recent (52 Geo. 3,) yet as many existing annuities may depend upon it, and as several of the decisions under it are equally applicable to the latter statute, it is necessary to refer to it.

The second section relates only to annuities granted previously to the statute.

The deeds are to contain the consideration and names at length.

S. 3. " In every deed, instrument, or other assurance, whereby any annuity or rent-charge shall, from and after the passing of this act, be granted, or attempted to be granted, the consideration really and bonâ fide, (which shall be in money only,) and also the name or names of the person or persons by whom and on whose behalf the said consideration, or any part thereof, shall be advanced, shall be fully and truly set forth and described in words at length: and in case the same shall not be fully and truly set forth and described, every such deed, &c. shall be void."

Where the consideration is returned or not paid, or paid in goods or retained, the Court may order the deed to be cancelled.

S. 4. " If any part of the consideration shall be returned to the person advancing the same, or in case the consideration, or any part of it, is paid in notes, if any of the notes, with the privity and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed without being first paid; or if the consideration, or any part of it, is paid in goods; or if any part of the consideration is retained on pretence of answering the future payments of the annuity, or any other pretence; in all and every of the aforesaid cases, it shall and may be lawful for the person by whom the annuity or rent-charge is made payable to apply to the Court, in which any action is brought for payment of the annuity, or judgment entered, by motion, to stay proceedings in the judgment or action; and if it shall appear to the Court that such practices as aforesaid, or any of them, have been used, it shall be lawful for the Court to order the deed, bond, instrument, or other assurance, to be cancelled, and the judgment, if any has been entered, to be cancelled."

Directions relating to the enrolment of memorials.

S. 5. " A particular roll shall be provided and kept by the clerks of the enrolments in Chancery, or their deputy, in which such memorials shall be entered, and every such memorial shall be duly enrolled in order of time, as the same shall be brought to the office; and the said clerks of the enrolments, or their deputy, shall specify upon the roll

the certain day, hour, and time on which such memorial is brought to the office, and shall grant a certificate of the enrolment thereof when required, and there shall be paid for the enrolment of every such memorial the sum of 1*s.* and no more, in case the same do not exceed 200 words; but if such memorial shall exceed 200 words, then after the rate and proportion of 6*d.* for every 100 words, and the like fees for every certificate and copy given; and the fee of 1*s.* for every search in the office, and no more."

Fees thereon.

Contracts for the purchase of annuities with persons under age void, and persons soliciting or procuring, guilty of a misdemeanor.

S. 6. "All contracts for the purchase of any annuity with any person, being under the age of twenty-one, shall be utterly void, any attempt to confirm the same after such person shall have attained the age of twenty-one years notwithstanding; and if any person shall either in person, by letter, agent, or otherwise procure, engage, solicit, or ask any person being under the age of twenty-one years, to grant or attempt to grant any annuity or rent-charge, or to execute any bond, deed, or other instrument for securing the same; or shall advance, or procure, or treat for any money to be advanced to any person under the age of twenty-one years, upon consideration of any annuity or rent-charge to be secured or granted by such infant, after he or she shall have attained his or her age of twenty-one years; or shall induce, solicit, or procure any infant upon any treaty or transaction for money advanced, or to be advanced, to make oath, or to give his or her word of honour, or solemn promise, that she or he will not plead infancy, or make any other defence against the demand of any such annuity or rent-charge, or the repayment of the money advanced to him or her when under age; or that when he or she comes of age, he or she will confirm or ratify, or in any way substantiate, such annuity or rent-charge; every such person shall be guilty of a misdemeanor."

Persons taking more than 10*s.* in the 100*l.* brokerage, guilty of a misdemeanor.

S. 7. "Solicitors, scriveners, brokers, and others, asking or receiving directly or indirectly any sums of money or other reward, for soliciting or procuring the loan, or for the brokerage of any money paid as the consideration of such annuity, &c. above the sum of 10*s.* for every 100*l.*

shall be guilty of a misdemeanor. The person who shall have paid the money shall be a competent witness."

Cases excepted from the act.

S. 8. The act does not extend to any annuity or rent-charge given by *will*, or by *marriage settlement*, or for the *advancement* of a child, nor to any *annuity* or *rent-charge* secured *upon lands* of *equal* or *greater annual value*, whereof the grantor was seised in *fee-simple* or *fee-tail in possession* at the time of the grant, or secured by the *actual transfer of stock* in any of the public funds, the dividends whereof are of *equal* or *greater annual value* than the said annuity; nor to any *voluntary* annuity granted without regard to pecuniary consideration; nor to any annuity, &c. granted by any *body corporate*, or under any *authority* or *trust* created *by act of parliament;* nor to any annuity where the sum to be paid *does not exceed* 10*l.* annually, unless there be more than one such last-mentioned annuity from the same grantor to or in trust for the same person.

Few statutes produced so much litigation as the first sections of this act, relating to the memorial and the instruments of assurance to be memorialized, as observed by Lord Eldon in Duff v. Atkinson. (*a*) "The misfortune is, that to those who mean improperly, the act holds out a language they cannot be expected to understand, the Courts not understanding it, and it embarrasses those meaning to engage in a righteous transaction, by throwing round it doubts from which no advice can disentangle them."

The result was that the legislature was obliged again to interfere, and substituted stat. 53 Geo. 3, c. 141, which, after repealing the former act as to any future annuities, laid down a form of enrolment of the memorial, which has required but slight alterations of the legislature to render it free from doubt or obscurity.

Every deed, &c. granting an annuity, to be enrolled.

2. By stat. 53 Geo. 3, c. 141, (repealing stat. 17 Geo. 3, c. 26,) it is enacted by s. 2, "that within *thirty* days after the

(*a*) 8 Ves. 577.

execution of every deed, bond, instrument, or other assurance, whereby an annuity or rent-charge shall, from and after the passing of this act, be granted for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, a *memorial* of the *date* of *every such deed*, bond, &c. of the *names* of *all the parties* and of *all the witnesses* thereto, and *of the person or persons for whose life or lives* such annuity or rent-charge shall be granted, and of the *person or persons by whom* the same *is to be beneficially received*, the *pecuniary consideration* or *considerations for granting* the same, and the *annual sum* or *sums to be paid*, shall be enrolled in Chancery, in the form or to the effect following, (*a*) with such alterations therein as the nature and circumstances of any particular case may reasonably require, otherwise *every such deed*, bond, &c. shall be null and void to all intents and purposes."

Companies to be described by their usual firm.

S. 3. "If any such annuity shall be granted by or to or for the benefit of *any company exceeding in number ten persons*, which company shall be formed for the purpose of granting or purchasing annuities, it shall be sufficient in any such memorial *to describe such company* by *the usual firm* or *name of trade*."

Names of persons beneficially interested to be stated.

S. 4. "In every deed, bond, &c. or other assurance, whereby any annuity or rent-charge shall be granted, or attempted to be granted, for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, where the person or persons, to whom such annuity shall be granted or secured to be paid, shall not be entitled thereto beneficially, *the name or names of the person or persons, who is or are intended to take the annuity beneficially, shall be described* in such or the like manner as hereinbefore required in the enrolment, otherwise every such deed, &c. or other assurance, shall be void."

Copies of deeds or instruments securing annui-

S. 5. "In case any person or persons, by whom any annuity or rent-charge, of which such particulars as aforesaid

(*a*) See Appendix, No. 10.

are hereby required to be enrolled, shall for the time being be payable, shall be desirous of obtaining a copy of every or any deed, &c. or other assurance whereby such annuity or rent-charge was granted, and of such his, &c. desire, shall give twenty-one days' notice in writing to the person or persons for the time being entitled to such annuity or rent-charge, such person or persons shall, on or before the expiration of such twenty-one days, unless prevented by fire or other inevitable accident, and in that case, if the assurances shall not be destroyed by such accident, then as soon after as such impediment shall be removed, send or deliver in to the person or persons requiring the same, a copy of every deed, &c. or other assurance whereby such annuity or rent-charge was granted, or of such of the assurances as in such notice shall be required, and such last mentioned person, &c. shall at the time of receiving the same pay to the person, &c. furnishing the same, a sum after the rate of sixpence for every 100 words contained in every such copy, and also the reasonable costs of sending or delivering the same, and the person, &c. holding the original instruments by which such annuity, &c. shall be secured, shall suffer the person, &c. to whom such copies shall be delivered or sent, to examine the same with the originals; and in case such copies shall not be sent or delivered, or the person, &c. holding the original instrument shall refuse to suffer such copies to be examined therewith according to the directions of this act, it shall be lawful for the person, &c. to whom the annuity, &c. is payable, to take out a summons from any of his majesty's justices of his Courts of King's Bench or Common Pleas, requiring the person, &c. neglecting to send or deliver such copies, or refusing to suffer the same to be examined with the original instrument as aforesaid, to appear before such judge and show cause on the premises; and it shall be lawful for the judge, before whom such person, &c. shall be summoned, to make such order for the production of the instrument by which such annuity, &c. shall be secured, and for suffering the complainant to take copies thereof and examine

ties, may be obtained on payment of a fee.

the same, or the copies delivered with the original instrument, and otherwise in the premises as to such judge shall seem meet."

Proceedings against the grantor of an annuity may be stayed if the consideration is not properly paid or withheld.

S. 6. " If any part of the consideration for the purchase of any such annuity or rent-charge shall be returned to the person advancing the same, or in case such consideration, or any part of it, shall be paid in notes, if any of the notes, with the privity and consent of the party advancing the same, shall not be paid when due, or shall be cancelled or destroyed without being first paid; or if such consideration is expressed to be paid in money, but the same, or any part of it, shall be paid in goods, or if the consideration of any part of it shall be retained, on pretence of answering the future payments of the annuity or rent-charge, or any other pretence; in all and every the aforesaid cases, it shall be lawful for the person to whom the annuity or rent-charge is made payable, or whose property is liable to be charged or affected thereby, to apply to the Court, in which any action shall be brought for the payment of the annuity or rent-charge, or judgment entered, on motion, to stay proceedings on the action or judgment, and if it shall appear to the Court that such practices as aforesaid, or any of them, have been used, it shall and may be lawful for the Court to order every deed, bond, instrument, or other assurance, whereby the annuity or rent-charge is secured, to be cancelled, and the judgment, if any has been entered, to be vacated."

And the instruments may be cancelled and judgment vacated.

A book is to be kept by the clerks of enrolment in Chancery.

S. 7. " A particular book shall be provided and kept by the clerks of the enrolments in Chancery, or their deputy, in which such particulars as hereinbefore mentioned shall be entered alphabetically by the names of the grantors, in order of time as the same shall be brought to the office, and the said clerks of the enrolments, or their deputy, shall specify in the book the certain day, hour, and time on which such particulars are brought to the office, and shall grant a certificate of the entry thereof when required; and there shall be paid for every such entry 20*s.* only, and the fee of 1*s.* for every certificate and copy given, and the fee of 1*s.* for every search in the office, and no more."

S. 8. " All contracts for the purchase of any annuity or rent-charge with any person, being under the age of twenty-one years, shall be void, any attempt to confirm the same, after such person shall have attained the age of twenty-one years notwithstanding; and if any person shall either in person, or by letter, agent, or otherwise howsoever, procure, engage, solicit, or ask any person, being under the age of twenty-one years, to grant, or attempt to grant any annuity or rent-charge, or to execute any bond, deed, or other instrument for securing the same, or shall advance, or procure, or treat for any money to be advanced for any person under the age of twenty-one years, upon consideration of any annuity or rent-charge to be secured or granted by such infant after he or she shall have attained his or her age of twenty-one years, or shall induce, solicit, or procure any infant, upon any treaty or transaction for money advanced or to be advanced, to make oath, or to give his or her word of honour that he or she will not plead infancy, or make any other defence against the demand of any such annuity or rent-charge, or the repayment of the money advanced to him or her when under age, or that when he or she comes of age, he or she will confirm or ratify, or in any way substantiate such annuity or rent-charge, every such person shall be guilty of a misdemeanor."

Contracts for the purchase of annuities with persons under age void;

and persons inducing infants to grant annuities guilty of misdemeanor.

S. 9. " All and every solicitors, scriveners, and brokers, and other persons who, after the passing of this act, shall ask or receive, directly or indirectly, any sum or sums of money, or any other kind of gratuity or reward for the soliciting or procuring the loan, and for the brokerage of any money that shall be actually and bonâ fide advanced and paid as and for the price or consideration of any such annuity and rent-charge, over and above the sum of 10*s.* for every 100*l.* so actually and bonâ fide advanced and paid, shall be deemed and adjudged guilty of a misdemeanor."

Asking or obtaining more than 10*s.* in the 100*l.* brokerage a misdemeanor.

S. 10. " This act shall not extend to Scotland or Ireland, nor to any annuity given by will or marriage settlement, or for the advancement of a child, nor to any annuity or rent-charge secured upon freehold or copyhold, or cus-

Exceptions of the act.

tomary lands in Great Britain or Ireland, or in any of his majesty's possessions beyond the seas, of equal or greater annual value than the said annuity, over and above any other annuity and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the grant, whereof the grantor is seised in fee-simple or fee-tail in possession, or the fee-simple whereof in possession, the grantor is enabled to charge at the time of the grant, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity; nor to any voluntary annuity or rent-charge granted without regard to pecuniary consideration or money's worth; nor to any annuity or rent-charge granted by any body corporate, or under any authority or trust created by act of parliament."

As the statute (*a*) of the 17 Geo. 3, therefore, only affects annuities granted before that of the 53 Geo. 3, it will scarcely be necessary at this time of day to notice the decisions upon it, except such as may by analogy bear upon the latter statute, many of the clauses of the two statutes being nearly similar.

Contents of memorial.

3. The memorial should express every deed, instrument, or other assurance for securing the annuity, as well as deeds granting it; (*b*) although the omission is not of so fatal a nature to the whole transaction as it was held to be under the former act, yet the particular instrument omitted will have no legal force or effect. (*c*)

It was held necessary to express in the memorial a will which the grantor was required to make and deposit with the grantee, and which she was to make an affidavit not to revoke; (*d*) also a bond to pay a sum of money, if the grantor went abroad in a military capacity. (*e*)

(*a*) Most of the cases under this statute are collected in Mr. Plowden's work on Annuities, and in the notes of Sir Wm. Evans upon the same statute in his Collection.

(*b*) Hood v. Burlton, 2 Ves. 29; Rosher v. Harding, 2 T. R. 678.

(*c*) See stat. 7 Geo. 4, c. 75.

(*d*) Ex parte Mackenzie, 4 Taunt. 323.

(*e*) Chawner v. Whaley, 3 East, 500.

It was not sufficient to notice some of the securities only in the recital of the annuity deed; (*a*) they must all be memorialized. Thus a warrant of attorney to confess judgment, (*b*) but the judgment signed thereon needed not be set out unless it were the only security. (*c*) There was some doubt as to the necessity of stating a fine, or the effect of stating it inaccurately. (*d*)

Under stat. 53 Geo. 3, it is sufficient to describe in the memorial an annuity granted for a term of years determinable on lives, as "an annuity for lives," and no description of cestui que vie is necessary, nor is it necessary to mention the penalty for which judgment is entered up. (*e*)

This statute does not extend to cases of fair and bonâ fide sale of interests in land, where the consideration in whole or in part may be an annuity payable to the vendor. (*f*)

But where the dividends of certain stock were assigned, with a proviso for a proportionate part of the dividends then accruing, between the date of the assignment and the day of the first growing due, it was held in a court of equity to be virtually a grant of an annuity, and that it ought therefore to be memorialized. (*g*)

An annuity deed contained the release of another annuity; it was held that such circumstance need not be set out in the memorial, but that the instrument was sufficiently described under 53 Geo. 3, as "the grant of an annuity." (*h*)

An enrolment was held to be unnecessary where the consideration for the grant of an annuity to the parents was

(*a*) Van Braam v. Isaacs, 1 Bos. & Pull. 451.

(*b*) Davidson v. Lord Foley, 2 H. Bla. 12; Hopkins v. Waller, 4 T. R. 463.

(*c*) Sherron v. Oxlade, 4 T. R. 824.

(*d*) Bradford v. Burland, 14 East, 445.

(*e*) Barber v. Gamson, 4 B. & A. 281.

(*f*) James v. James, 2 B. & B. 702.

(*g*) Charretie v. Vause, 1 Sim. 153; and see Hood v. Burlton, 2 Ves. jun. 29; Brown v. Likes, 14 Ves. 302.

(*h*) Crowther v. Wentworth, 6 Barn. and Cr. 366.

their giving up the farm they occupied and the stock thereon. (*a*)

Under stat. 53 Geo. 3, the clause of redemption need not be inserted in the memorial. (*b*)

Under stat. 17 Geo. 3, where an annuity was granted under a trust deed to raise money by annuities, it was held not necessary to enrol the trust deed, (*c*) nor was it necessary to enrol an old annuity bond assigned to secure a smaller annuity to a second annuitant. (*d*)

From the language of the two statutes as to the memorial, the 17th Geo. 3, requiring a memorial of "*every deed, bond, instrument*, or other assurance," the 53d Geo. 3, requiring a memorial "of the *date* of *every* such deed," &c., the cases upon 17th Geo. 3, may be considered as applicable to the latter statute, with this distinction, that whilst the former required a memorial of the *deeds* themselves, that is, of the substantial parts of them, the latter requires only the *dates, parties*, witnesses, &c. thereof. A serious question arose under the former act, whether the omission to memorialize a particular instrument vitiated the whole transaction, or only the particular instrument. Upon which Lord Kenyon differed in opinion from Lord Loughborough. Some additional weight has been given to Lord Loughborough's opinion, because he drew the act; that circumstance however affords it no legitimate authority, Lord Kenyon being of opinion that the particular instrument only was vitiated, (*e*) whilst Lord Loughborough held that the omission vitiated the whole transaction. The legislature has, however, by stat. 3 Geo. 4, c. 93, s. 2, enacted and *declared* that every deed, &c. granting any annuity, &c. and of which a memorial shall have been duly enrolled, notwithstanding the omission to enrol any other deed, &c. for securing such annuity, &c. shall be valid.

Only the particular deed not enrolled is void.

(*a*) Tetley v. Tetley, 4 Bing. 214.

(*b*) Yems v. Smith, 3 B. & A. 206.

(*c*) O'Callaghan v. Ingilby, 9 East, 135.

(*d*) Henderson v. Countess of Glencairn, 2 Taunt. 235.

(*e*) See Ex parte Chester, 4 T. R. 694; Hart v. Lovelace, 6 T. R. 471; Duke of Bolton v. Williams, 2 Ves. jun., 184; 4 Bro. C. C. 310.

As to the witnesses.

4. It was held under the stat. 17th Geo. 3, that it was not sufficient to state that all the instruments were attested by A. B. C. and D. or one of them, (*a*) so that a memorial stating the deeds to be attested by A. B. C. and D. was held insufficient, if all of them were not attested by all those witnesses. (*b*)

Also that the omission of the christian name of one of the witnesses, as attesting one of the instruments, did not defeat the annuity, if the name were truly stated, as to the attestation of the other instruments, (*c*) and that it was sufficient to state, that the securities were executed in the presence of A. B., without adding that he attested them. (*d*)

It has been held, under stat. 53 Geo. 3, that where the enrolment took place within thirty days after the execution by the grantee, though before the execution of the grantor, it would be sufficient, otherwise when the grantor was abroad it might be impossible to comply with the act; and that it appeared that the statute did not require that there should be any attesting witnesses, but only if there were any that their names should appear upon the memorial. (*e*)

Under the same statute it was held in the case of Darwin v. Lincoln and Lock, (*f*) that the word "of," contained in the form prescribed by that act in the column relating to the witnesses and immediately following their names, coupled with the act itself, imported that the place of residence and description of the witnesses should be inserted.

This opinion of the Court of King's Bench was felt to be of very serious concern, as these requisites having been in many instances not complied with, numerous other annuity transactions were involved in it besides the one in question.

The legislature therefore interfered by stat. 3 Geo. 4, c. 93, s. 1, and thereby enacted and *declared* that by the

(*a*) Hart v. Lovelace, 6 T. R. 471.
(*b*) Ex parte Mackreth, 2 East, 563.
(*c*) Watts v. Millard, 5 T. R. 598.
(*d*) Wallis v. Lade, 4 Taunt. 761.
(*e*) Flight v. Buckeridge, 3 Bing. 215.
(*f*) 5 B. & A. 444; and see Smith v. Pritchard, 5 B. & A. 717.

No description of the witnesses is necessary.

act of the 53 Geo. 3, c. 141, no further or other description of the subscribing witness or witnesses to any deed, bond, instrument, or other assurance, whereby any annuity, &c. may be granted is required in the memorial thereof, besides the names of all such witnesses.

Under the stat. 53 Geo. 3, c. 141, it was also held in the cases of Check v. Jeffries (*a*) and Metcalf v. Bowes, (*b*) that a memorial was insufficient which did not set forth the Christian name of an attesting witness at full length.

This decision also being of very serious consequence, as involving the fate of other annuities, the legislature again interposed, and by stat. 7 Geo. 4, c. 75, it was enacted and *declared* that by stat. 53 Geo. 3, c. 141, no further or other name or names of the subscribing witness or witnesses to any deed, bond, &c. or other assurance, whereby any annuity or rent charge is or may be granted, is or are required in the memorial thereof, besides the names of all such witnesses, as they shall appear signed to their attestations respectively of the execution of such deed, bond, &c. or other assurance.

The Christian name of witnesses need not be set out at length in the memorial, but only as they appear in the attestations.

As observed by the Master of the Rolls, in Phillips v. Const, (*c*) "The effect of this act not simply neutralizes the determinations of the Court of King's Bench on this point, it has on operation similar to a writ of error, and it amounts to a declaration that the judges of the King's Bench had not rightly construed the 53d Geo. 3;" and therefore his Honour held, in the case before him, which was under the 17th Geo. 3, that the language of that statute upon the point being less precise than in 53 Geo. 3, the memorial was not invalid, although the initials only of the subscribing witnesses' Christian names appeared.

The consideration of granting the annuity.

5. The consideration or considerations of granting the annuity is to be set forth. It is said, that bank notes may be described as money, (*d*) upon reference to the form in

(*a*) 2 Barn. & Cress. 1.
(*b*) 5 Ibid. 258.
(*c*) 3 Russ. 272.
(*d*) Wright v. Reed, 3 T. R. 554; Cousins v. Thompson, 6 T. R. 335.

stat. 53 Geo. 3, however it will be safer to describe bank notes as such; and it has been held that promissory notes and country bank notes must be specifically so stated, (*a*) also a banker's check and the time of its becoming due, (*b*) but if received in money by the grantor before the execution of the deeds it may be stated as money. (*c*)

The whole money may be stated as paid, although the fair expenses of the writings are immediately paid out of it, (*d*) but not where a charge for commission is made by the grantee, he being a solicitor. (*e*)

When part of the consideration is the giving up a former annuity it cannot be stated as money, (*f*) nor can money lent previously upon promissory notes which were given up; (*g*) nor money retained by the grantor with consent of the grantee for a debt due to the former by the attorney of both parties, and accounted for by a receipt from the grantor to the grantee, and a promissory note from the attorney to the grantor; (*h*) the nominal consideration of 10*s*. need not be stated. (*i*)

Where the consideration was stated in the deed to have been paid to the grantor by the grantee, but in the receipt indorsed it was stated to have been paid by the hands of the agent of the former, it was held sufficient. (*k*)

Upon the redemption of an annuity it was agreed, that if the grantor should afterwards wish to borrow money upon the same terms the same deeds should be given as a security; and upon an advance of money the deeds were

(*a*) Rumball v. Murray, 3 T. R. 298; Morris v. Wall, 1 Bos. & Pull. 208.

(*b*) Berry v. Bentley, 6 T. R. 690; Poole v. Cabares, 8 T. R. 328; Drake v. Rogers, 2 B. & B. 19.

(*c*) Ex parte Michell, 2 East, 137.

(*d*) Monys v. Leake, 8 T. R. 411; Philips v. Crawford, 9 Ves. 214; 13 Ves. 475.

(*e*) Broomhead v. Eyre, 5 T. R. 597.

(*f*) Wasburn v. Birch, 5 T. R. 472.

(*g*) Kirkman v. Price, 1 H. Bla. 309.

(*h*) Watts v. Millard, 5 T. R. 598.

(*i*) Snee v. Everard, 6 T. R. 545.

(*k*) Doe d. Mason v. Phillips, 5 M. & S. 369.

given accordingly without fresh enrolment; but the Court of King's Bench considered the transaction irregular, and directed them to be cancelled. (*a*)

The stat. 17 Geo. 3, required that in every deed, &c. the consideration to be in money only, and also "the names of the person or persons by whom and on whose behalf the consideration or any part thereof should be advanced," should be set forth in words at length. The stat. of the 53 Geo. 3, is however not so precise, it requires only "the pecuniary consideration or considerations for granting the same" to be inserted in the memorial; but by the sixth section renders the transaction voidable if the consideration is expressed to be paid in money, but the same or any part be paid in goods. As observed by Lord Kenyon, in Kelfe v. Ambrosse, (*b*) "the great mischief intended to be provided against by the legislature in this act, was the fraud and circumvention of those who took advantage of the necessities of distressed persons desirous of taking up money upon annuities by putting off goods upon the latter at their own price instead of money, which goods they were afterwards to dispose of at considerable loss."

Retaining the consideration.

Where a stipulation was made that the grantor should *pay* out of the consideration the expense of certain other deeds granting annuities secured by such deeds, and further secured by the present, it was held that the circumstance that the party to whom such expenses were paid was a partner of the grantee, did not make it a retainer or return of the consideration within stat. 53 Geo. 3. (*c*)

An annuity has been set aside after a lapse of sixteen years, where a large part of the pecuniary consideration was retained by the grantee's agent for the expense of deeds, journies, &c. upon the terms of an account being taken and payment of the balance of principal and interest due. (*d*) So an annuity has been set aside where the con-

(*a*) 5 T. R. 635.
(*b*) 7 T. R. 551.
(*c*) Astin v. Gwinnett, 3 Y. & J. 136.
(*d*) Williamson v. Gould, 1 Bing. 234; and see Henry v. Taylor, 3 Bing. 177.

sideration money and person on whose behalf paid were untruly stated; (*a*) so where the agents of grantor insisted on retaining the amount of money lent him, as well as the charges of preparing the securities. (*b*) So where a grantor desired the consideration to be divided into three sums, which was paid at one time by the agent of all the grantees, who retained 300*l.* for the expenses of all the annuities; it was held that the retainer extended to all, although retained on a note, forming part of the consideration of one of the grantees only, and all the annuities were set aside. (*c*)

The exceptions of the acts, where no memorial is necessary.

6. It has been held, under the exceptions in the statutes as to "annuities secured on lands of equal or greater annual value in fee or tail, in possession, or by transfer of stock," that such exception extends to grants made by persons having a joint power of appointment over the fee, executing such power by granting an annuity and appointing lands for a term of years in trust for the grantee, (*d*) also to an annuity secured on lands in fee of equal value, as well as on leasehold premises, (*e*) also to an annuity secured on an equity of redemption, the annual value being more than the annuity, (*f*) also to fair and bonâ fide sales of interests in lands, where the whole or part of the consideration may be an annuity payable to the vendor. (*g*) The annuity to come within the terms of the exception must be a direct and specific charge upon the land, and not a possible charge or incumbrance, as in the case of a judgment entered up on a warrant of attorney. (*h*)

(*a*) Williams v. Hockin, 8 Taunt. 435; and see Mence v. Hammond, 6 Moore, 490.

(*b*) Calton v. Porter, 2 Bing. 370; and see Gorton v. Champneys, 1 Bing. 287

(*c*) Jones v. Silverschildt, 4 Bing. 26; and see Finlay v. Gardner, 6 B. & Cr. 165.

(*d*) Halsey v. Hales, 7 T. R. 194.

(*e*) Ex parte Mitchell, 2 East, 137.

(*f*) Tucker v. Thurstan, 17 Ves. 131; Amhurst v. Skynner, 12 East, 263.

(*g*) James v. James, 2 Brod. & Bing. 702.

(*h*) Walford v. Marchant, 2 Barn. & Ad. 315.

The Court will not try the value of land upon affidavit upon a summary application, but will direct an issue. (*a*)

There must be an actual transfer of stock to come within the exemptions, and an authority by a person entitled to dividends for life for trustees to apply them in payment of an annuity is not sufficient, (*b*) but the exemptions extend to an annuity secured on a reversionary interest on stock where nothing is immediately paid to the grantor. (*c*)

A surety to an annuity deed charged his own freehold estate of greater annual value than the annuity with a trust to pay the annuity if in arrear. It was held to be within the exception of stat. 17 Geo. 3, c. 26, and that no memorial was necessary. (*d*)

The condition of the bond recited a settlement on the marriage of the plaintiff with one of the defendant's sisters, and an agreement to secure a sum of money to be paid to the trustees upon trust, to pay the interest to the husband for life; the father having died without paying it, the husband agreed to secure the sum to the trustees upon his own estates, and to accept from the defendants, the father's executors, a moiety thereof, and an annuity during his life: it was held that it was not an annuity requiring to be enrolled under 53 Geo. 3, c. 141. (*e*)

The memorial is only a collateral and not a constituent part of the grantee's title; and if no objection be made in any of the pleadings, or proofs as to the sufficiency of the memorial, a court of equity will not question the validity of an annuity on that account. (*f*)

There is no obligation under stat. 53 Geo. 3, c. 141, s. 2, for parties to describe the property on which the annuity is secured. It has therefore been held that the words "grant of an annuity" were a sufficient description of the nature

(*a*) Saunders v. Wright, 1 Taunt. 369.

(*b*) Hudson v. Skinner, 6 T. R. 596; Duff v. Atkinson, 8 Ves. 577.

(*c*) Brown v. Douthwhaite, 1 Mad. 446; Crespigny v. Wittenoom, 4 T. R. 790.

(*d*) Darwin v. Lincoln, 5 B. & A. 444.

(*e*) Blake v. Attersol, 2 Barn. & Cr. 875.

(*f*) Dunn v. Calcraft, 2 Sim. & Stu. 56.

of the instrument of grant, although it was further secured by an assignment of stock. (*a*) Under the same act also it has been held, in the Court of Exchequer, that it is not necessary in the memorial to insert a further charge to secure other annuities not granted by the deed; the object of that act is only to require such a memorial as will enable a party to obtain certainly the production of the deed. (*b*)

Where a memorial stated an annuity of 237*l.* to be 257*l.* the mistake was held to be fatal and to render the warrant of attorney and all the proceedings upon it void, but the Court set aside the judgment on payment of all costs, and of the motion as between solicitor and client. (*c*)

(*a*) Browne v. Ley, 6 Barn. & Cr. 689.
(*b*) Aston v. Gwinnell, 3 Y. & J. 136.
(*c*) Hone v. Morgan, 4 M. & Ry. 559.

CHAPTER III.

OF THE PROCEEDINGS IN RESPECT OF ANNUITIES.

1. *Jurisdiction of the Courts of Law.*
2. *Jurisdiction of the Courts of Law under the Statutes, and their General Jurisdiction.*
3. *Jurisdiction of Courts of Equity.*

1. An action of *annuity* lies for the recovery of an annuity or yearly payment of a sum of money granted to another in fee for life or years, charging the person of the grantor only; and it may be brought by the grantee or his heirs, or his or their grantee, against the grantor or his heirs, if the grant be for him and his heirs (*a*), but this action has become *obsolete*, being superseded by the action of *debt* or *covenant*.

The statutes of limitation do not extend to the action of annuity. (*b*)

The *judgment* in annuity was for the plaintiff to recover the annuity and arrearages of the same, as well before the bringing of the action as afterwards, up to the time when judgment was given (*c*).

Of proceedings to set aside annuities under the statutes.

2. A jurisdiction is given to the courts of law under the former annuity act (17 Geo. 3, c. 26,) by the fourth section, and under the latter (53 Geo. 3, c. 141,) by the sixth section. In the cases enumerated by such fourth section, which relates to the mode of payment of the consideration, the *person by whom* the annuity or rent-charge *is made payable*, may apply to the Court in which any action is brought or judgment entered, by motion, to stay pro-

(*a*) Co Lit. 144 b; 1 Tidd, 4. (*b*) 1 Saund. 38; 2 Saund. 66.
(*c*) Co. Entr. 50; Cro. Car. 436.

ceedings on the judgment or action, and if it shall appear to the Court that the practices enumerated (*a*) in the section or any of them have been used, the Court may order the deed, bond, instrument, or other assurance to be cancelled, and the judgment, if any has been entered, to be vacated.

The sixth section of stat. 53 Geo. 3, uses much the same language as the fourth section of 17 Geo. 3; it however contains this addition, that not only the person by whom the annuity is made payable may apply to the Court, in the cases enumerated, but also *the person whose property* is *liable to be charged* or *affected thereby.*

It was therefore held, under the fourth section of stat. 17 Geo. 3, that the power of application to the Court was confined to the grantee, and did not extend to an assignee of the premises subject to the annuity, although the deed might be void for other reasons, (*b*) and the power is confined to cases where an action is brought and does not apply to defects by reason whereof the annuity is void under the first section, (*c*) but a surety has been permitted to apply under the 17 Geo. 3, as he stands in the place of a grantor. (*d*)

General jurisdiction on a warrant of attorney.

Although the jurisdiction of the Courts is thus confined *under the acts*, yet upon their general jurisdiction they will give relief: thus the Court of King's Bench will take cognizance of a warrant of attorney to confess judgment for an annuity void under the act, and direct it to be cancelled, (*e*) but will not set aside the other deeds. (*f*)

So in Thurkill v. Wallace, (*g*) the Court of King's Bench held that, independent of the act, it had been long ago settled upon much argument and deliberation that the Court had a summary jurisdiction over every warrant of attorney to enter up judgment in the Court, before any judgment had been actually entered up, and may, if they see proper,

(*a*) See ante, pp. 195—200. (*b*) Garrood v. Sanders, 6 T. R. 403.
(*c*) Symonds v. Cobourne, 1 Bos. & Pull. 482.
(*d*) Broomhead v. Eyre, 5 T. R. 597; Hunt on Annuities, 2d ed. 159.
(*e*) Ex parte Chester, 4 T. R. 694; and see 1 Bos. & Pull. 66, n.
(*f*) Id. Ibid. (*g*) Cited Ibid.

direct it to be cancelled to prevent any improper use being made of it.

Such judgments on warrants of attorney are only included in the clauses upon that subject as were intended to be part of the security, and they do not extend to cases where judgment is obtained in the ordinary course of law on any instrument given for securing it, therefore, after verdict and judgment on non est factum, the application for summary relief is too late.(*a*)

Levying a fine does not give general jurisdiction to the Court of Common Pleas.

It was held, in Craufurd v. Caines, in the Court of Common Pleas, (*b*) that the levying a fine does not give general jurisdiction to that Court as a warrant of attorney does to the Court of King's Bench.

The application to the Court comes too late after judgment upon warrant of attorney, elegit, and verdict in ejectment; the defendant should have resisted upon the ejectment, (*c*) and if a rule for setting aside an annuity has been discharged upon the merits a new application will not be entertained upon the same state of facts, although a different objection may be raised, (*d*) nor upon another fact in the knowledge of the party but not proved on the former application. (*e*)

The Court of Common Pleas refused to set aside an annuity after the death of the grantor upon a statement of facts which he might have contradicted if living, (*f*) nor will the Court of King's Bench set aside an annuity after the death or imbecility of the agent who negotiated the transaction and could alone speak to the facts, the annuity being paid during his life, (*g*) and it appears that upon an application under the fourth section of 17 Geo. 3, the Court has a discretionary power to refuse to vacate the securities. (*h*)

(*a*) Buck v. Tyte, 7 T. R. 495. (*b*) 2 H. Bla. 458.
(*c*) Wetley v. Woolley, 7 T. R. 540.
(*d*) Greathead v. Bromley, 7 T. R. 455.
(*e*) Schumann v. Weatherhead, 1 East, 537.
(*f*) Haynes v. Hare, 1 H. Bla. 659; and see Ex parte Maxwell, 2 East, 85.
(*g*) Poole v. Cabanes, 8 T. R. 328.
(*h*) Girdlestone v. Allan, 6 B. & A. 61; 2 D. & R. 150, S. C; and see Barber v. Gamson, 4 B. & A. 281.

But the Court has no discretion but to give relief at any time where the defects appear on the face of the instruments; as where only some of the deeds were attested by the witnesses mentioned in the memorial, (*a*) or upon a warrant of attorney when all the deeds are not stated in the memorial. (*b*)

Objections to be stated on setting aside an annuity.

By the general rule, Trinity Term, 42 Geo. 3, King's Bench, the objections intended to be insisted on where a rule is obtained to shew cause for the purpose of setting aside an annuity, must be stated in the rule nisi.

The same rule has since been adopted in the Court of Common Pleas.

Although the Court, under 17 Geo. 3, c. 26, s. 6, will set aside the judgment for arrears of annuity on the ground of minority, as well as the want of a proper memorial, yet the case not being one of those enumerated in s. 4, it has no authority to order the deeds to be delivered up, (*c*) the same observation seems applicable to the corresponding sections in stat. 53 Geo. 3.

Where an annuity is sought to be set aside there must be an affidavit by the grantor of the original transaction, (*d*) and upon an application after a great lapse of time the affidavits should state that all the parties are alive. (*e*)

Jurisdiction of Courts of equity.

3. The jurisdiction of the Courts of equity to set aside an annuity for legal objections founded on the act is now settled. In Byne v. Vivian, (*f*) an annuity secured by a bond and a term of years being void under stat. 17 Geo. 3, by reason of the memorial not taking notice of the term and the clause of redemption, and also stating the payment of the consideration as money, though it was paid by draft, an account was decreed of what was due to the grantee for

(*a*) Ex parte Macreth, 2 East, 563; Van Braam v. Isaacs, 1 Bos. & Pul. 451.

(*b*) Van Braam v. Isaacs, 1 Bos. & Pul. 451; but see Const v. Phillips, 4 D. & R. 344, in which the Court considered itself not imperatively bound.

(*c*) Storton v. Tomlins, 2 Bing. 475; and see Steadman v. Purchase, 6 T. R. 737.

(*d*) Dartnall v. Marquess of Wellesley, 3 Brod. & Bing. 255, C. P.

(*e*) Amstead v. Atkins, 2 Chitt. 32, K. B.

(*f*) 5 Ves. 604.

principal and interest in respect of the purchase money, and to tax the costs, and an account of all sums received by him on account of the annuity; and that what should be found due from him be deducted from what should be found due to him for principal, interest, and costs: and upon the grantor's paying to the grantee what should so remain due to him within three months, or in case it should be found that the grantee had been fully satisfied, it was ordered that the grantee deliver to the grantor the indenture and bond to be cancelled: and convey the premises, free from incumbrances, and deliver all the deeds, &c., and in case it should appear that the grantee had been over paid *that he should pay such overplus* to the grantor: and if the grantor did not pay what, if any, money should appear due to the grantee, that the bill should be dismissed with costs: and the Lord Chancellor (Lord Loughborough) said " with respect to this question, there are, I apprehend, several decrees.(*a*) There can be no doubt that though a Court of law would set aside the judgment, yet if they come to a determination not to meddle with the other securities I must take away the incumbrances, and this Court does it upon equitable terms, considering him as an incumbrancer, it is clear they would be nonsuited in an ejectment, but still it is an incumbrance: an estate is created: and a charge of 15*l.* a year during the life of the plaintiff. They must pay the principal, interest, and costs."

In the next case of Byne v. Potter,(*b*) which contained similar circumstances, the decree was that " the defendant (the grantee's executor,) admitting that he had received more than was due to him for principal and interest," the several deeds therein mentioned ought to be set aside, and delivered up to be cancelled, and that the defendant pay the plaintiff the costs of the suit. So that there the defendant was allowed to retain the surplus.

In the next case, Bromley v. Holland,(*c*) only a few months later than Byne v. Vivian, the Master of the Rolls

(*a*) See Duke of Bolton v. Williams, 2 Ves. 138. (*b*) 5 Ves. 609.
(*c*) 5 Ves. 610.

(Lord Alvanley) yet doubted the jurisdiction. The plaintiff, it appeared, had come into equity upon a legal objection, to have the securities delivered up after two unsuccessful applications to the Court of King's Bench, and his Lordship, with reference to that part of the case, said "he shall not now avail himself of any objection that was the ground of application to the Court of King's Bench:" Byne v. Vivian is certainly a very strong authority in favour of the interposition of the Court, and goes farther than I am inclined to go. This is a very hard case. It is the case of an assignee, not a dealer in annuities, having advanced her money with the concurrence of the plaintiff, who, after two unsuccessful attempts at law, now comes upon a legal objection, as to which great doubts have been entertained, though the point must now be considered settled. I *will not disturb any payments made before the bill was filed.*" His Lordship, on a subsequent day, said "I have changed my opinion as to the terms of relief, for I think I should not do justice unless I make the decree upon the repayment of the whole sum of 600*l.* (the original purchase money), though there is a small difference between that and the sum paid upon the assignment. I consider it as an assignment of an annuity of 100*l.* a year redeemable upon the repayment of 600*l.* with the arrears to that time. I consider the defendant as having purchased that annuity, and all payments made before the objection was taken are such as a Court of equity cannot order to be repaid. There was nothing illegal or immoral in the receipt of them, though the payments could not have been enforced. The only decree I feel myself at liberty to make is for *redemption* on the payment of the whole sum, unless the defendant will consent to take the money advanced by her." Lord Alvanley's decree, however, as to the *mode* of relief, was reversed by Lord Eldon,(*a*) and an account was directed of the consideration paid by the original grantee of the annuity, with interest at 5 per cent., and of the *payments of the annuity to the grantee, or any person claiming under him* by *assignment or other-*

(*a*) 7 Ves. 3.

wise, to be applied in discharge of the interest and principal of the consideration, and if the consideration with interest should appear to be fully repaid, or if not, upon payment by the plaintiff of what should be remaining due from him, the securities to be delivered up, &c. with costs: and his Lordship held that the principle of relief was not *redemption* but the *invalidity* of the grant, and that an assignee, unless under special circumstances, is in the situation of the grantee.

The principle of relief is the invalidity of the grant and not redemption.

It has been held, that where an annuity is set aside for non-compliance with the act, that the grantee has no lien on the estate on which it is secured for the price of the annuity. (*a*)

In Angell v. Hadden, (*b*) the decree referred it to the Master to inquire whether an annuity had been properly enrolled; the Master having reported against the enrolment, it was objected by the defendant, the annuitant, on a rehearing, that the decree had been pronounced after two several orders made in this Court in another cause for payment of the annuity, and after a rule to show cause in favour of the annuity, in the Court of King's Bench, had been discharged. But the Court held, that this was not a sufficient ground for setting aside the decree, for the former cause, in which those orders were obtained, was not instituted for the purpose of setting aside the annuities, nor were they a subject of discussion, and this Court has jurisdiction to give relief, notwithstanding the rejection of a summary application to a court of law for the purpose of setting aside an annuity. The Court also held, upon the authority of the Duke of Bolton v. Williams, (*c*) that the annuitant was not entitled to a *specific lien*, in respect of the consideration of the annuity, upon arrears of the rent-charge paid into Court under the decree. Lord Loughborough's language, in the Duke of Bolton v. Williams, upon the same point, was, " I finish the cause by

Where an annuity is set aside grantee has no specific lien on the estate or fund on which it is secured.

(*a*) Davis v. Duke of Marlborough, 2 Wils. 152.
(*b*) 2 Mer. 164; 15 Ves. 244; 16 Ves. 202.
(*c*) 4 Bro. Cha. Ca. 297; and see Ex parte Wright, 19 Ves. 258.

saying they have no right, *nor any lien* upon it, but are only general creditors." The question whether, in the ordinary case, a person, wishing to purchase an annuity out of a specific fund, intended to be made liable to it, could have any demand against that fund for the purchase-money; or whether, if the contract for the annuity is vitiated, the demand under the implied contract is anything more than a personal demand, was considered by Lord Eldon in Jones v. Harris, (*a*) and his lordship was of opinion, that it was impossible successfully to contend that the annuity, being under the statute void, the fund, upon which the annuity was to be charged, should become liable, in the nature of a mortgage, for the consideration; it could only be *a personal demand.* Even upon the question whether a married woman, with separate property, being so far a feme sole, ought to be *so* considered to the extent that she should be taken to intend to charge the property, in respect of which only the Court could give execution,—his lordship thought that it would be difficult to maintain, that where her intention was not to contract a personal debt, or to charge a gross sum upon her separate estate, but the contract was for an annuity, which the party dealing with her had the power to make effectual, and he failed in that, a court of equity ought to assist him, and to give him such a charge as she did not intend to give or he intend to have, and his lordship held, on the authority of the Duke of Bolton v. Williams, that the consideration-money could not be recovered out of the separate estate, though part of the money had been applied in paying fines upon admission to copyholds.

The principle of the terms of the courts of equity in setting aside an annuity, which usually are "an account of the consideration paid to the grantor with interest, deducting the payments from time to time made by him, which are to be applied in the first place in discharge of the interest and then of the principal," appears to be adopted by the courts of common law; and at law, where the transaction

(*a*) 9 Ves. 496.

is vitiated for want of compliance with the act, the purchase-money may be recovered back in an action for money had and received, (*a*) and the payments may be set off, although made above six years before, the statute of limitations not being replied. (*b*) The action may be maintained, if the grantor has procured the warrant of attorney to be set aside on motion, although the other securities remain, (*c*) or even if the grantor has refused to pay the annuity on the ground of its invalidity. (*d*)

Premiums of insurance not allowed in the account.

But the premiums of insurance on the grantor's life, being for the grantee's security, are not allowed in the account, (*e*) although under special circumstances they have been allowed the bill, offering to pay any fair and reasonable demands, and the insurance having been proposed in a letter, as a reasonable term. (*f*)

(*a*) Shove v. Webb, 1 T. R. 732. (*b*) Hicks v. Hicks, 3 East, 16.
(*c*) Scurfield v. Gowland, 6 East, 241. (*d*) Waters v. Mansell, 3 Taunt. 56.
(*e*) Ex parte Shaw, 5 Ves. 620.
(*f*) Hoffman v. Cooke, 5 Ves. 623; and see Gwynne v. Heaton, 1 Bro. C. C. 1; Heathcote v. Paignon, 2 Bro. Cha. Ca. 167.

APPENDIX.

No. I.

Average Clause in Policy of Insurance against Fire.

Provided always and it is hereby declared, that in case the property insured by this policy in all the buildings, places, or limits above mentioned, shall at the breaking out of any fire, or fires, be collectively of greater value than the sum insured thereon, the said company shall pay and make good to the insured such a proportion only of the loss or damage sustained as the amount insured shall bear to the whole property aforesaid at the time when such fire or fires shall first happen. But it is at the same declared that if the said insured shall, at the time of any fire, be insured in this or any other office, on any specific parcel of goods, or on goods in any specified building or buildings, place or places, included in the terms of this insurance, this policy shall not extend to cover the same, except only as far as relates to any excess of value beyond the amount of such specified insurance or insurances, which excess is hereby declared to be under the protection of this policy, and subject to average as aforesaid.

No. II.

The Collection and Payment of the Duties on Fire Insurances by the Offices, Stat. 55 *Geo.* 3, *c.* 184, *s.* 32.

The per-centage duty on insurances against loss by fire granted by this act shall be collected and received from the persons whose property shall be insured, for the use of his Majesty, &c.

by the public companies, &c. licensed, or who ought to be licensed, pursuant to stat. 22 Geo. 3, c. 48, and by the Royal Exchange and London Assurance Companies respectively, at the time of their making, renewing, or continuing of, or receiving the premium for the insurances in respect of which the duty shall be payable, and for the whole term or period for which the insurances shall be made, renewed, or continued; and such duty shall be accounted for and paid over in the manner directed by this and the said last mentioned act; and the Royal Exchange and London Assurance Corporations shall be subject to all the provisions and regulations of this and the said last mentioned act, in the same manner as any other public companies, except only as to the taking out of a license from the said commissioners of stamps. S. 32.

The duties to be received by the companies.

Quarterly accounts to be delivered by the companies.

That every quarterly account to be delivered to the said commissioners of stamps or their officers by the corporations or companies, or others insuring against fire, pursuant to the directions of the said statute 22 Geo. 3, c. 48, shall contain a true and faithful account of all the policies and insurances which shall have been issued and made, or renewed, or continued by them, whether for a year or for more years than one, or for any period exceeding or falling short of a year, from the first to the last of the quarter (both inclusive) for which such account shall be rendered: together with the numbers and dates of the policies; the names and places of abode of the persons whose property shall be insured; the sum or amount of the sums insured on each policy; the time for which each insurance shall be made, or renewed, or continued, and the duty which shall have been received for the same; and there shall be annexed to and delivered with every such quarterly account an affidavit, or solemn affirmation in the case of Quakers, made by the secretary, or if no secretary, by the chief clerk of the corporation or company by whom it shall be delivered, stating that he has examined and checked the same with the books of such corporation or company, and that to the best of his knowledge, information, and belief, it does contain a true and faithful account of the several matters and things required by this act, and also of any allowance or returns of duty, in respect of time unexpired on policies surrendered, which may be therein stated to have been made pursuant to the said act of 22 Geo. 3, and for any default in the delivery of such account with such affidavit or affirmation

thereto annexed as aforesaid, the corporation or company, or person or persons making such default, shall forfeit the sum of 500*l.* S. 33.

That any public companies who shall use any other quarter days than those mentioned in the said act 22 Geo. 3, as the period of the commencement or termination of their insurances, shall be at liberty to make up their quarterly accounts to the quarter days used by them, and to deliver the same to the said commissioners of stamps, or their officers, within two calendar months after the expiration of the quarter for which they shall be made up. S. 34. Usual quarter days may be applied.

All companies and persons having offices, or carrying on the business of fire insurance at a greater distance than five miles from London and Westminster, shall, if required by the said commissioners of stamps, transmit their quarterly accounts with such affidavits or affirmations as aforesaid thereto annexed, immediately to the said commissioners at their head office, and pay the amount of the duties due on such quarterly accounts immediately to the receiver General of the duties under the management of the said commissioners, and in default thereof shall be subject to the same penalties as they would have been under the said act 22 Geo. 3, for not delivering their accounts and paying the monies due thereon conformable to the provisions of the said act. S. 45. Country offices to transmit their accounts.

An allowance shall be made to the corporations or companies, and others collecting and receiving the said duties hereby imposed on insurances against loss by fire, and accounting for and paying over the same, as required by this and the said act of 22 Geo. 3, that is to say, to those having their head office in London or Westminster, an allowance at and after the rate of four per cent. on the amount of the duties collected and received at such head office, and at and after the rate of five per cent. on the amount of the duties collected by their agents out of London and Westminster, and to those not having their head office in London or Westminster, an allowance at the rate of five per cent. on the amount of the duties collected by them; provided they shall deliver their quarterly accounts containing all the requisite particulars, and make payment of the said duties within the time prescribed by this or the said last mentioned act. S. 36. Allowance to offices in respect of duties.

No. III.

Form of Policy of Insurance against Fire by the Corpotion of the Royal Exchange Assurance of Houses and Goods from Fire.

This present instrument or policy of assurance, witnesseth that whereas A.B. hath agreed to pay into the treasury of the Corporation of the Royal Exchange, London, for the assurance of from loss or damage by fire. Know all Men by these presents, That the capital stock, estate, and securities of the said corporation shall be subject and liable to pay, make good, and satisfy unto the said assured, his heirs, executors, or administrators, any loss or damage which shall or may happen by fire to the said goods and aforesaid, (except such goods as hemp, flax, tallow, pitch, tar, turpentine, glass, china, and earthenware, writings, books of accounts, notes, bills, bonds, tallies, ready money, jewels, pictures, gunpowder, hay, straw, and corn unthrashed,) within the space of twelve calendar months from the day of the date of this instrument or policy of assurance, not exceeding the sum of and shall so continue, remain, and be subject and liable as aforesaid, from year to year, to be computed from the day of in every year, for so long time as the said assured shall well and truly pay or cause to be paid, the sum of into the treasury of the said corporation, on or before the day of which shall be in each succeeding year, and the said corporation shall agree thereto by accepting and receiving the same; which said loss or damage shall be paid in money immediately after the same shall be settled and adjusted; or otherwise if the said loss or damage shall not be adjusted, settled, and paid within sixty days after, notice thereof shall be given to the said corporation by the said assured, that then the said corporation, their officers, workmen, or assigns, shall, at the charge of the said corporation, at the end and expiration of the said sixty days, provide and supply the said assured with the like quantity of goods of the same sort and kind, and of equal value and goodness, with those burnt or damnified by fire. Provided always nevertheless and

it is hereby declared to be the true intent and meaning of this deed or policy that the said stock, estate, and securities of the said Corporation shall not be subject or liable to pay or make good to the assured any loss or damage by fire which shall happen by any invasion, foreign enemy, or any military or usurped power whatsoever. Provided also that this deed or policy shall not take place or be binding to the said Corporation until the premium for one year is paid, or in case the said assured shall hereafter make any other assurance upon the goods aforesaid, unless the same shall be allowed of and specified upon the back of this policy. Or if the said A.B. at the time when any such fire shall happen, shall be in the possession of, or let to any person who shall use or exercise therein the trade of a sugar baker, apothecary, chemist, colourman, distiller, bread or biscuit baker, ship or tallow chandler, stable keeper, inn-holder, or maltster, or shall be made use of for the stowing or keeping of hemp, flax, tallow, pitch, tar, or turpentine; but that in all or any of the said cases these presents and every clause, article, and thing herein contained shall cease, determine, and be utterly void, and of none effect, or otherwise shall remain in full force and virtue. In witness whereof the said Corporation have caused their common seal to be hereunto affixed the day of in the year of the reign of Our Sovereign Lord by the Grace of God, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, &c. and in the year of our Lord one thousand eight hundred

N.B. This Policy to be of no force if assigned, unless such Assignment be allowed by an entry thereof in the Books of the Company.

No. IV.

Form of Policy of an Insurance against Fire by the Protector Fire Insurance Company.

WHEREAS ha paid the sum of to the directors of the " Protector Fire Insurance Company," and ha also agreed to pay the sum of yearly on the day of during the continuance of this policy, for insuring from loss or damage by fire the property hereby described, not exceeding the sum specified on each article, namely:

Now be it hereby known, that we, whose hands and seals are hereunto subscribed and affixed, being three of the said directors, do covenant and agree with the said that from the day of 182 to and inclusive of the whole of the day of 182 and so long as the said insured shall pay, or cause to be paid, the sum of at the time above-mentioned, and the directors for the time being shall accept the same, the stock and funds of the said company shall be subject and liable to pay or make good, and shall to the extent only of the said stock or funds pay or make good to the said insured, executors, administrators or assigns, all such loss or damage as shall happen by fire, (except loss or damage by fire happening by any invasion, foreign enemy, civil commotion or riot, or any military or usurped power whatever,) to the property above-mentioned, amounting in the whole to no more than the sum of according to the conditions indorsed on this policy.

In witness whereof we have hereunto set our hands and seals this day of in the year of our Lord one thousand eight hundred and twenty .

Signed, sealed, and delivered
in the presence of G. H. A. B.
C. D.
Examined, I. K. E. F.
Entered, L. M.

Conditions indorsed on which this Company make Insurances from Loss or Damage by Fire.

I. Every person desirous of effecting an insurance must state his name, place of abode, and occupation; he must describe the construction of the buildings to be insured, where situate, and in whose occupation; of what materials the same are respectively composed, and whether occupied as dwelling-houses or otherwise; also the nature of the goods, or other property, on which such insurance may be proposed, and the constructions of the buildings containing such property.

II. Every insurance attended with particular circumstances of risk, arising from the situation or construction of the premises, or the nature of the trade carried on, or the goods therein, is to be specially mentioned in the order given for the policy, so that the risk may be fairly understood; if not so expressed, or if any misrepresentation be given, so that the insurance be effected upon a lower premium than ought to be paid; or if buildings or goods be described in the policy otherwise than they really are; or if, after an insurance shall have been effected, the risk shall be increased by the erection or alteration of any stove; the carrying on any hazardous trade, operation, or process; the deposit of any hazardous goods or hazardous communication; the insured will not, except under the consent of the directors, and on the terms they may impose, be entitled to any benefit under his policy.

III. No insurance proposed to this company is to be considered in force until the premium or duty, or a deposit on account thereof, be actually paid. No receipts are to be taken for any premiums of insurance, or deposits, except such as are printed and issued from the office, and witnessed by one of the clerks or agents of the office.

IV. The interest of any deceased person in any policy of this company may be continued to the executor or administrator respectively, or to the person otherwise entitled to the property insured, provided the person so entitled shall procure his or her interest to be indorsed on the policy at the office of the company; and if goods insured be removed to any other situation than where the same were deposited at the time of effecting the insurance, such removal must be allowed by indorsement on the policy.

V. Where loss of rent is intended to be covered by the sum insured, the amount must be specified on the policy.

VI. Persons insuring property at this office must give notice of any other insurance made elsewhere on the same property on their behalf, and cause a minute or memorandum of such other insurance to be indorsed on their policies; in which case this company shall only be liable to the payment of a rateable proportion of any loss or damage which may be sustained; and unless such notice be given, the insured will not be entitled to any benefit under this policy.

VII. All persons insured by this company, sustaining any loss or damage by fire, are forthwith to give notice to the company at their head office in London, and, as soon as possible, to deliver in as particular an account of their loss or damage as the nature of the case will admit, and make proof of the same by affidavit or affirmation before a justice of the peace, and produce such other evidence as the directors of this company may reasonably require; and until such affidavit or affirmation, account and evidence are produced, the amount of such loss, or any part thereof, shall not be payable or recoverable; and if there appear fraud in the claim made for such loss, or false swearing or affirming in support thereof, the claimant shall forfeit all benefit under such policy, except such as the directors may think fit to allow.

VIII. Persons insured by this company, and who may suffer loss, will receive their indemnity without deduction or discount; but in every loss the company will reserve to itself the right of reinstatement within a reasonable time, in preference to the payment of claims, if it shall judge that course to be most expedient.

IX. It is a principle of the company, that no individual proprietor is to be in any case liable to contribute to the stock and funds of the company more than his or her unpaid part of the capital of the company; and after a proprietor has transferred any share with the approval of the directors, the transferree, and not the former proprietor, is to be answerable for the unpaid capital on that share.

X. If any difference shall arise with respect to the amount of any claim for loss or damage by fire, and no fraud suspected, such difference shall, according to the provisions of the deed of settlement for the purpose, be submitted to arbitrators indifferently chosen, whose award shall be conclusive.

No. V.

Indorsement of Policy of Insurance against Fire on Removal of Property.

The property insured by this policy (or such of the property as is insured) having been removed to the insured's dwelling-house, brick, timber, and tiled, situate in in the county of the same shall remain insured in such house, and not as heretofore.

The same sums insured, and premiums as before.

Entered in the office books this day of .

No. VI.

Transfer of Policy on Conveyance of Interest by Purchase or Gift.

I, A. B., do hereby assign all my right and interest in this policy to C. D. of in the county of .

Witness my hand this day of .

Signed in the presence of and entered in the office books this day.

No. VII.

Memorandum to be indorsed on a Policy in case of an Addition.

Memorandum. It is hereby declared, that there is a stove erected in one of the sheds adjoining the herein described; the same is hereby allowed without prejudice to this insurance.

Entered day of .

No. VIII.

Form of a Policy of Insurance upon a Life for the Life of the Insured, by the Society for Equitable Assurances upon Lives.

This present instrument or policy of insurance witnesseth, that whereas A. B. of in the county of hath entered into and become a member of the Society for Equitable Assurances on Lives and Survivorships, according to a certain deed of settlement, bearing date the seventh day of September, which was in the year of our Lord one thousand seven hundred and sixty-two, and inrolled in his Majesty's Court of King's Bench at Westminster, and whereas the said society, relying upon the truth of a certain declaration dated this day of made and signed by the said A. B. touching the age, state of health, and other circumstances attending the said A. B. have assured to the said A. B. the sum of pounds, to be paid to his executors, administrators, or assigns, after the decease of the said A. B., whensoever the same shall happen, provided the said assured does not exceed the age of years on this day of and has had the small pox, and is not afflicted with any disorder which tends to the shortening of life, (as in the said declaration is more fully set forth,) at and under the annual sum or premium of .

And whereas the said assured hath executed the covenants usually entered into by members of the said society, and hath paid such premium for one whole year, commencing from the date of these presents: now we, whose names are hereunto subscribed and seals affixed, being two of the trustees of the said society, do for ourselves and our assigns, trustees of the said society, covenant, promise and agree to and with the said assured, and the executors, administrators, and assigns of the said assured, that if the said assured, or the assigns of the said assured, shall yearly and every year, during the term of this assurance, continue to pay to the trustees of the said society, or to any two or more of them, the annual sum or premium aforesaid on or before the day of in every year, and shall observe,

perform, and fulfil and keep all and singular the covenants, articles, clauses, provisoes, conditions, and agreements, which on the part and behalf of the said assured are and ought to be observed, performed, fulfilled, and kept, according to the true intent and meaning of the said deed of settlement; we, or our assigns, trustees of the said society for the time being, will or shall, within six calendar months after satisfactory proof shall have been made of the death of the said assured, well and truly pay, or cause to be paid, out of the stock or fund of the said society, unto the executors, administrators, or assigns of the said assured, the full sum so hereby assured: provided always, and it is hereby declared to be the true intent and meaning of this policy of assurance, and the same is accepted by the said assured upon these express conditions, that in case the said assured shall die upon the seas, or shall go beyond the limits of Europe, unless license be obtained from the court of directors, or shall die by his own hands or by the hands of justice, or if the age of the assured does exceed years; or if the said assured be now afflicted with any disorder which tends to the shortening of life, or if the above-mentioned declaration contains any untrue averment, this policy shall be void.

In witness, &c.

No. IX.

Policy of Insurance on the Life of a Third Person, by the Crown Life Insurance Office.

WHEREAS the person assured by this policy, is desirous and has proposed to effect an assurance with the Crown Life Assurance Company, in the sum of upon the life of for the whole continuance thereof, and has caused to be delivered into the office of the said company a declaration or statement in writing, bearing date the day of signed by whereby it was declared, amongst other things, that the age of the said did not exceed years; that he had had the small pox, that he had had the cow pox, that he had not had the gout, and that he was not affected with fits, convulsions, asthma, insanity, or spitting of blood, or any disorder which tended to the shortening of life, and whereby the said assured agreed that such declaration or statement should be the basis of the contract between himself and the said company. And whereas the said assured has paid to the directors of the said company the sum of as the premium or consideration for the assurance of the said sum of until the day of inclusive; and has also paid the further sum of as the full premium or consideration for the assurance of the said sum of for one whole year, commencing the day of and terminating on the day of inclusive, the receipt whereof is hereby acknowledged.

Now, therefore, this policy witnesseth, that we three directors of the said company, whose names are hereunto subscribed, do hereby agree, that in case the said shall die at any time previous to the said day of or within the term of one year commencing on the day of and terminating on the day of both inclusive; or if the said assured, or his assigns, shall in the event of the said

living beyond the said term of one year, pay or cause to be paid to the said company during his life, the like annual premium of on or before the day of in the year and on or before the same day in every subsequent year, the funds and property of the said company applicable by the deed or deeds of settlement of the said company to the payment of monies assured by life policies, shall, according to the provisions of such deed or deeds, be subject and liable to pay and satisfy to the said assured, his executors, administrators, or assigns, within three calendar months next after proof shall have been given to the satisfaction of the directors of the said company, of the death of the said the full sum of of lawful money, together with such further security, if any, as shall have been assigned to or in respect of this policy, pursuant to the rules and regulations for the time being of the said company, as or by way of bonus or addition to the sum hereby assured.

Provided, nevertheless, that in case any untrue allegation be contained in the declaration or statement so as aforesaid delivered into the office of the said company on behalf of the said assured, or if it should be proved that the referees have knowingly given false testimonials, then this policy of assurance shall be void. Provided, also, that this policy and the assurance hereby effected are and shall be subject and liable to the several conditions, restrictions, and stipulations hereupon indorsed, so far as the same are or shall be applicable, in the same manner as if the same respectively were here repeated and incorporated in the policy. Provided always, nevertheless, that the subscribed capital stock and other the funds and property of the said company, by the deed or deeds of settlement applicable to the payment of monies assured by life policies, shall, subject to all prior claims and demands, alone be liable to answer and make good all claims and demands in respect of this policy, and that no director or other proprietor of the said company, his executors or administrators, shall by reason of this or any other policy, or of the whole of the policies taken together, which any director has signed or may sign, be in anywise individually subject or liable to any claims or demands beyond the amount of the unpaid part of his share or shares in the said subscribed capital stock, and that no other person shall on any account whatsoever be in any-

wise subject or liable to any claims or demands in respect of this policy.

In witness whereof, we, three of the directors of the said company, have hereunto set our hands this day of in the year of our Lord .

A. B.
C. D.
E. F.

Examined, G. H.

Entered, I. K.

Conditions indorsed in cases of ordinary Risks.

Policies will not be considered to be in force beyond thirty days after the expiration of the year, unless the premium then due shall have been paid to the company, but should proof be given to the satisfaction of the directors, that the party or parties whose life or lives hath or have been assured continue in good health, the policies may be revived at any period within six months, on the payment of a fine, to be fixed by the board of directors, not exceeding ten shillings per cent. on the sum assured; or at any period within thirteen months, on the payment of such fine as a board of directors may think reasonable.

Policies will become void if the parties whose lives have been assured shall go beyond the limits of Europe, or shall die on the high seas, (except in passing from one part of the United Kingdom of Great Britain to another, and to and from the Islands of Guernsey, Jersey, Alderney, Sark and Man, and also in time of peace in King's ships, and in steam or other packet or passage vessels to or from British ports, and any foreign ports between the Elbe and Brest, both inclusive,) or being or becoming military or naval men, shall be called into actual service, unless in each case the parties shall avail themselves of the scale of premiums allotted to the specific risk by the company.

Assurances made by persons on their own lives will become void if they die by duelling, by their own hands, or by the hands of justice. But the directors in their discretion may make such allowance in respect of the policies of the deceased as they may deem just and reasonable.

Policies may be assigned by a separate deed, of which forms may be had at the office.

If any person should become desirous of discontinuing an insurance effected at this office for the whole term of life, the company will purchase the interest in such policy at a fair price.

All claimants upon the decease of any person whose life shall have been assured by the company, must, if required, make proof thereof, and give such further information respecting the same as the directors may think reasonable.

Reasonable proof will also be required of the time of birth, unless that fact shall have been previously established, in which case the same will be admitted by indorsement on the policy.

The time for payment of claims accruing by death is within three calendar months after the proof of the death of the party or parties upon whose life or lives the assurance has been effected.

No. X.

Heads of Indenture of Assignment of a Policy of Insurance on Life as a Security for a Debt.

This Indenture made the day of between A. B. of the one part, and C. D. of the other part, (recites the policy,) and that A. B. had requested C. D. to lend and advance the sum of witnesseth, that in consideration of A. B. hath granted, bargained, sold, assigned, &c. and by these presents doth, &c. all that instrument or policy of insurance, &c. and all sum or sums of money due, owing, or recoverable by virtue of the said policy, and the full benefit and advantage of the same, and of all profits or bonuses, &c. to have, hold, &c. unto the said C. D. &c.

Provided, that if the said A. B. pay, &c. unto the said C. D. on or before the day hereinafter mentioned, the said sum of and all and every sum which shall be then due and owing, together with interest for the same, without deduction, then the said C. D. &c. will at the request of the said A. B. reassign the said policy free from incumbrances.

Provided, that if default be made in payment of such sum of for the space of next after the day for payment of the same, it shall be lawful for C. D. without consent of A. B. to sell the said policy by public auction or private contract unto any person, &c. who shall be willing to become the purchaser, &c. thereof, for the best price, &c. and on payment to assign the said policy as such purchaser, &c. shall direct or appoint, and to make effectual receipts for the same, and to exonerate the purchaser, &c. from liability to inquire into the necessity of the sale, and from all responsibility as to the application of the produce, and out of the monies, &c. to satisfy any premiums paid by C. D. &c. for the purpose of keeping on foot the said policy, and all costs, &c. relating to the recovery of the money due or to become due on the said policy, or the said sum of and to apply the residue towards payment of the said sum of and of all other sums which may be due and

owing at the time of such sale, and interest thereof, and in case of a surplus to pay the same to A. B.

A. B. constitutes C. D. his attorney, and to give receipts or prosecute actions or suits for recovering payment, and ratifies all acts of C. D.

Covenant by A. B. to pay the said sum of on or before together with interest and all costs.

That A. B. hath done no act to incumber or vacate said policy, hath power to assign, will not revoke any power or authority, covenant for further assurance of the said policy, and that A. B. will during the continuance of this security pay said premiums payable in respect of such policy, and within thirty days after the same become due will produce to C. D. receipts for the same, and will truly observe the terms and conditions of the said policy.

If A. B. shall refuse or neglect to pay the premiums in respect of the said policy, or to do any thing necessary for keeping on foot the same, it shall be lawful for C. D. &c. to pay said premiums, and such other sums, &c. and such premiums and sums shall stand charged upon the said policy, and may be retained out of the monies to be recovered thereon.

That A. B. will not depart out of England without giving a month's notice to C. D. of A. B.'s intention, in order that C. D. may be enabled to make known the same at the office of the said society, and pay additional premium if necessary.

That A. B. during the continuance of such security will not go beyond the limits of Europe without the consent of C. D. or permit or do any thing whereby such policy may be avoided.

That A. B. will not without consent of C. D. or the order, judgment, or decree of some Court of Law or Equity, release or discharge any part of the said sums.

No. XI.

Form of Memorial of Annuity. (53 *Geo.* 3, *c.* 141.)

Date of Instrument.	Nature of Instrument.	Names of Parties.	Names of Witnesses.	Name or Names of Person or Persons by whom Annuity or Rent-charge to be beneficially received.	Person or Persons for whose life or lives the Annuity or Rent-charge is granted.	Consideration, and how paid.	Amount of Annuity or Rent-charge.
10 Aug. 1813.	Indenture of lease and release.	A. B. of the one part, C. D. of the other part.	E. F. of G. H. of	C. D.	A. B.	£100 paid in money, £500 paid in Notes of the Governor and Company of the Bank of England, or other Notes or Bills of Exchange, as the case may be.	£100 a year.
Same date. .	Bond in penalty of £1200.	A. B. to C. D.	E. F.	For securing the same Annuity or Rent-charge.			
Same date. .	Warrant of attorney to confess judgment on the same bond.	A. B. to I. K. and L. M. Attornies of the Court of King's Bench.	E. F. G. H.				

No. XII.

Bond from A. B. to C. D. for securing an Annuity for the Life of A. B.; also to be secured by a Warrant of Attorney and Deed of Grant.

KNOW all men by these presents, That I A. B. (the obligor) of &c. am held and firmly bound to C. D (the obligee) of &c. in the sum of £1600 of good and lawful money of Great Britain, to be paid to the said C. D. or his certain attorney, executors, administrators, or assigns; for which payment to be well and faithfully made I bind myself, my heirs, executors, and administrators, and every of them, firmly by these presents sealed with my seal. Dated this, &c.

WHEREAS the above-bounden A. B. hath agreed with the above-named C. D. for the sale to him the said C. D. of one annuity or yearly sum of £100, to be paid to the said C. D. his executors, administrators, or assigns, during the life of the said A. B. and to be secured as well by the Bond of the said A. B. as also by a Deed of Grant and Warrant of Attorney, at or for the price or sum of £800; and upon the treaty for the said sale it was agreed by the said A. B. and C. D. that the costs and expenses of preparing and perfecting the said several securities for the said annuity, and for enrolling a memorial thereof, should be paid and borne by the said A. B. And whereas the said C. D. hath on the day of the date of the above-written bond or obligation, with his own proper hands, duly paid the sum of £800 in good and valid notes of the Governor and Company of the Bank of England, commonly called Bank Notes, and expressed to be payable respectively to the bearer thereof on demand, unto the said A. B. in full for the purchase of the said annuity or yearly sum of £100, which he the said A. B. doth hereby admit and acknowledge. NOW THE CONDITION of the above-written bond or obligation is such, that if the said A. B. his, heirs, executors,

or administrators, or some or one of them, do and shall well and truly pay or cause to be paid unto the said C. D. his executors, administrators, or assigns, during the natural life of him the said A. B. one annuity or yearly sum of £100 of lawful money current in Great Britain, by four even and equal quarterly payments on the day of the day of the day of and the day of in every year, without any deduction or abatement whatsoever, and do and shall make the first payment of the said annuity or yearly sum of £100 on the day of next ensuing the day of the date of the above-written bond or obligation, if he the said A. B. shall then be living; and if the said A. B. shall depart this life before the said day of next, or shall survive the same day of and shall afterwards depart this life on any other day than any one of the said quarterly days of payment, then do and shall pay a proportionate part of the said annuity or yearly sum of £100 to the said C. D. his executors, administrators, or assigns, immediately after the decease of the said A. B. for the time which he the said A. B. shall have lived of the said current quarter of a year. Then the above-written bond or obligation to be void and of no effect, or else to be and remain in full force and virtue.

Signed, sealed, &c.

No. XIII.

Grant of an Annuity secured upon Freehold Property during the Life of the Grantor.

THIS INDENTURE made, &c. between A. B. (the grantor) of, &c. of the first part, C. D. (the grantee) of, &c. of the second part, and J. R. the trustee of, &c. of the third part. WHEREAS under or by virtue of certain indentures of lease and release bearing date respectively on or about the and days of 1806, the release being made or expressed to be made between, &c. being the settlement executed previously to the marriage then intended to be and shortly afterwards duly solemnized between the said A. B. and Harriet D. afterwards called H. B. his wife, (and since dead,) the messuages, &c. hereinafter particularly mentioned, with their appurtenances, were conveyed and limited after the determination of certain uses and estates in the said indenture of release mentioned, which have all since determined, or become incapable of taking effect, to the use of the said A. B. and his assigns, during the term of his natural life, with divers remainders over. AND WHEREAS the said A. B. hath contracted and agreed with the said C. D. for the absolute sale to him the said C. D. of one annuity or clear yearly sum of £100, to be paid to the said C. D. his executors, administrators, or assigns, during the life of the said A. B. and to be secured in manner hereinafter mentioned, at or for the price or sum of £800, and upon the treaty for the said sale it was agreed, that the costs of preparing and perfecting the securities for the said annuity, and for enrolling a memorial thereof, should be borne and paid by the said A. B. AND WHEREAS in pursuance and performance of the said agreement on the part of the said C. D. he the said C. D. hath this day with his own proper hands duly paid the said sum of £800 in good and valid notes of the Governor and Company of the Bank of England, commonly called Bank Notes, and expressed to be payable respectively to the bearer thereof on demand, unto the said A. B. AND WHEREAS in pursuance and part perform- Recitals.

ance of the said agreement on the part of the said A. B. it is intended that the said A. B. shall immediately after the sealing and delivery of these presents, execute a certain bond or obligation in writing in the penal sum of £1600 already prepared and engrossed, and bearing or intended to bear even date with these presents, with a condition thereunder written for making void the same on payment of the said annuity or clear yearly sum of £100, as therein and hereinafter mentioned, and shall likewise execute a certain warrant of attorney, already prepared and engrossed, and bearing or intended to bear even date with these presents, thereby authorizing certain attornies of his Majesty's Court of King's Bench at Westminster to confess judgment against him the said A. B. in an action of debt on the said bond for the sum of £1600, besides costs of suit; and it is intended that judgment shall and may be forthwith entered up thereupon accordingly. Now this Indenture witnesseth, that in pursuance and further performance of the said recited agreement, and for and in consideration of the sum of £800 of lawful money of Great Britain, that is to say in Bank Notes as aforesaid, to the said A. B. in hand well and truly paid by the said C. D. at or immediately before the sealing and delivery of these presents, the receipt of which said sum of £800, and that the same is in full for the purchase of the said annuity, he the said A. B. doth hereby admit and acknowledge, and of and from the same and every part thereof doth hereby acquit, release, exonerate, and discharge the said C. D. his executors, administrators, and assigns, and every of them for ever, he the said A. B. hath given, granted, bargained, sold, and confirmed, and by these presents doth give, grant, bargain, sell, and confirm unto the said C. D. his executors, administrators, and assigns, one annuity or clear yearly rent or sum of £100 of lawful money of Great Britain, to be charged and chargeable upon and issuing and payable out of all that, (*a*) &c. and out of and upon their and every of their appurtenances, to have, hold, receive, and take the said annuity, or yearly rent, or sum of £100, unto and by the said C. D. his executors, administrators, and assigns, henceforth for and during the term of the natural life of the said A. B. to be computed from the day next before the day of the date of these presents, the said annuity to be paid and payable by four even and equal quarterly payments, on the day of the day of

Consideration.

Grant of annuity.

To have, hold, &c.

(*a*) The premises to be described.

the day of and the day of in every year, without any deduction or abatement out of the same, or any part thereof, for or on account of any present or future taxes, charges, rates, assessments, or impositions, or any other matter, cause, or thing whatsoever. The first payment of the said annuity, or yearly rent, or sum of £100, to be made on the day of next ensuing the day of the date of these presents, if the said A. B. shall then be living; and if the said A. B. shall depart this life before the said day of or shall survive the same day of and shall afterwards depart this life on any other day than any one of the said quarterly days of payment, then a proportionate part of the said annuity, or yearly rent, or sum of £100, to be paid to the said C. D. his executors, administrators, or assigns, immediately after the decease of the said A. B. for the time which he the said A. B. shall have lived of the then current quarter of a year. And the said A. B. for himself, his heirs, executors, and administrators, doth covenant, grant, and agree with and to the said C. D. his executors, administrators, and assigns, by these presents in manner following, (that is to say) that if the said annuity or yearly rent, or sum of £100, or any part thereof, shall be in arrear and unpaid by the space of twenty-one days next after any of the said days or times whereon the same ought to be paid as aforesaid, then and in such case as often as the same shall happen it shall and may be lawful for the said C. D. his executors, administrators, or assigns, to enter into and upon all or any of the said messuages, &c. hereinbefore charged with the said annuity, or yearly rent, or sum of £100, and to distrain for the said annuity, or yearly rent, or sum of £100, and for all arrears thereof, and to sell and dispose of the distress and distresses then and there taken, or otherwise to demean therein, according to law, in like manner as in the case of distress taken for rent reserved by lease or common demise, to the end and the intent that he the said C. D. his executors, administrators, or assigns, may be fully paid and satisfied the said annuity, or yearly rent, or sum of £100, and all arrears of the same, and all costs, charges, and expenses occasioned by the nonpayment of the same. And also that in case the said annuity, or yearly rent, or sum of £100, or any part thereof, shall at any time or times hereafter be in arrear and unpaid by the space of thirty-one days next after any of the said days or times on which the same ought

Power of distress, &c.

to be paid as aforesaid, then and in such case and from time to time as often as the same shall happen it shall and may be lawful (although no legal demand shall have been made thereof,)

Power of entry.

for the said C. D. his executors, administrators, or assigns to enter into or upon and to hold and enjoy all and singular the said messuages, &c. hereinbefore charged with the payment of the said annuity, or yearly rent, or sum of £100, or any part thereof, and to receive and take the rents, issues, and profits thereof to and for his and their own use and benefit until he or they shall therewith and thereby or otherwise be fully paid and satisfied all the arrears of the said annuity, or yearly rent, or sum of £100, due at the time of such entry, and which shall afterwards accrue and become due and payable during his and their being in possession of the same premises, together with all such costs, charges, damages, and expenses whatsoever, which he or they shall sustain or be put unto by reason of the nonpayment thereof, and such possession when taken to be without impeachment of waste. And the said A. B. for himself, his heirs, executors, and administrators, doth covenant, promise, and agree to and with the said C. D. his executors, administrators, or assigns, by these presents in manner following, that is to say, that he the said A. B. his heirs, executors, or administrators, or some or one of them, shall and will well and truly pay or cause to be paid unto the said C. D. his executors, administrators, or assigns, for and during the natural life of him the said A. B. the said annuity, or yearly rent, or sum of £100, and also such proportionate part thereof as aforesaid as when the same respectively shall become due and payable as aforesaid, without any deduction or abatement whatsoever, and according to the true intent and meaning of these presents. And that the said A. B. now hath in himself good right, full power, and lawful and absolute authority to grant and confirm the said annuity, or yearly rent, or sum of £100, and to charge the same upon all and singular the said messuages, &c. hereinbefore mentioned in manner aforesaid, and according to the true intent and meaning of these presents. And that all and singular the same messuages, &c. shall during the natural life of the said A. B. and also during such time thereafter as any arrears of the said annuity, or yearly rent, or sum of £100, or any costs or expenses incurred in respect thereof shall remain unpaid, continue and be charged and chargeable with and subject and liable to the dis-

Covenant by grantor to pay annuity.

Good right to grant.

That the premises shall be charged.

tress and distresses entry and entries of the said C. D. his executors, administrators, or assigns, or other the powers and remedies herein contained for the recovery of the same. And that free and clear, and freely and clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by the said A. B. his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all and all manner of former and other grants, charges, and incumbrances whatsoever. And further, that he the said A. B. and all and every persons and person whomsoever having or claiming, or who shall or may at any time or times hereafter have or claim any estate, right, title, or interest, legal or equitable, in, to, or out of the said messuages, &c. hereinbefore charged with the payment of the said annuity, or yearly rent, or sum of £100, shall and will at any time or times hereafter, upon every reasonable request of the said C. D. his executors, administrators, or assigns, but at the proper costs and charges of the said A. B. make, do, and execute, or cause or procure to be made, done, and executed all and every such further and other lawful and reasonable acts, deeds, assurances, matters, and things whatsoever, for the further, better, more perfectly, and absolutely charging the said messuages, &c. with the said annuity or yearly rent, or sum of £100, and such powers and remedies for recovering and enforcing payment thereof as aforesaid as by the said C. D. his executors, administrators, or assigns, or his or their counsel in the law shall be reasonably advised and required. (*a*) And this indenture also witnesseth, that in pursuance and further performance of the said recited agreement on the part of the said A. B., and in consideration of the said sum of £800 to him paid by the said C. D. as hereinbefore is mentioned, and for the more effectually securing the payment of the said annuity, or yearly rent, or sum of £100 to the said C. D., his executors, administrators, and assigns, and in consideration of 10*s.* of lawful money aforesaid to the said A. B. well and truly paid by the said J. R. at or immediately before the sealing or delivery of these presents, the receipt whereof is hereby acknowledged, he, the said A. B., upon the nomination and appointment of the said C. D. (testified by his signing and sealing these presents) hath granted, bargained, sold and demised, and by these presents doth

Free from incumbrances.

For further assurance.

(*a*) If the premises consist of buildings, a covenant to insure against fire will be properly inserted here.

grant, bargain, sell and demise unto the said J. R., his executors, administrators, and assigns, the messuage, &c. and all and singular other the premises hereinbefore charged with the payment of the said annuity, or yearly rent, or sum of £100, or expressed and intended so to be, with their appurtenances; And all the estate, &c. To have and to hold the said messuages, &c. and all and singular other the premises hereinbefore described, with their appurtenances, (subject to and chargeable with the said annuity, or yearly rent, or sum of £100, and the powers and remedies hereinbefore given for securing the payment thereof,) unto the said J. R., his executors, administrators, and assigns, for and during the term of 500 years, to be computed from the day next before the date of these presents, and thenceforth next ensuing and fully to be complete and ended, (if the said A. B. shall so long live,) without impeachment of waste, Upon the trusts nevertheless, and to and for the intents and purposes hereinafter expressed or declared of or concerning the same, that is to say, Upon trust that he, the said J. R., his executors, administrators, or assigns, do and shall permit and suffer the said A. B. and his assigns to receive and take the rents, issues, and profits of the said messuages, &c. hereinbefore demised, or intended so to be, until the said annuity, or yearly rent, or sum of £100, or some part thereof, shall happen to be in arrear and unpaid by the space of forty days next after any of the said days or times whereon the same ought to be paid as aforesaid; And when and as often as the said annuity, or yearly rent, or sum of £100, or any part thereof, shall be in arrear and unpaid by the space of forty days next after the same shall become due and payable, do and shall, by and out of the rents and profits of the said messuages, &c. hereinbefore demised, or intended so to be, or by demising, leasing, mortgaging, or selling or disposing of the same premises respectively, or any part thereof, for all or any part of the said term of 500 years, or by bringing any action or suit against the tenants or occupiers of the said premises for the recovering of the rents, issues, and profits thereof, or by all or any of the ways or means aforesaid, or by such other ways or means as to him or them shall seem meet, levy and raise such sum or sums of money as will be sufficient, or as he or they shall think expedient to raise, for paying and satisfying unto the said C. D., his executors, administrators, or assigns, the said annuity, or yearly rent, or sum of £100, or such part thereof as shall be

Demise of premises for a term of years.

Upon trust that A. B. may receive the rents until default,

and upon default to raise the money.

in arrear and unpaid, and all costs, charges, and expenses whatsoever, which they the said C. D. and J. R., or either of them, their or either of their executors, administrators, or assigns, shall or may sustain or be put unto by reason of the non-payment of the said annuity, or yearly rent, or sum of £100, or of any part thereof, or otherwise in the execution of the trusts of the said term of 500 years, and do and shall pay and apply the money so to be levied and raised, or a competent part thereof, in or towards the satisfaction of the said annuity, or yearly rent, or sum of £100, or so much thereof as shall be in arrear and unpaid as aforesaid, and of all costs, charges, and expenses accordingly, and do and shall pay the residue and surplus (if any) of the said money unto the said A. B., his executors, administrators, or assigns, for his or their own use and benefit; And the said A. B. for himself, his heirs, executors, and administrators, doth covenant, promise, and agree to and with the said J. R., his executors, administrators, and assigns, by these presents in manner following, that is to say, that he the said A. B. now hath in himself good right, full power, and absolute authority to bargain, sell, and demise the said premises, &c. hereinbefore demised, or intended so to be, unto the said J. R., his executors, administrators, or assigns, for and during the said term of 500 years, (determinable as aforesaid,) upon the trusts and in the manner aforesaid, according to the true intent and meaning of these presents; And that from and after default shall be made in payment of the said annuity, or yearly rent, or sum of £100, or any part thereof, contrary to the true intent and meaning of these presents, he the said J. R., his executors, administrators, or assigns, shall and lawfully may peaceably and quietly enter into and upon, and hold, occupy, and enjoy all and singular the said messuages, &c. hereinbefore demised, or intended so to be, and receive and take the rents, issues, and profits thereof, upon the trusts and in manner aforesaid, and according to the true intent and meaning of these presents, without any hinderance, interruption, or disturbance whatsoever, of or by the said A. B., or any other person or persons whomsoever, and that free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise, by him the said A. B., his heirs, executors, or administrators, well and sufficiently protected and kept indemnified of, from, and against all, and all manner of adverse estates, titles, troubles, charges, liens, and incumbrances whatsoever; and fur-

Covenant by grantor that he has good right to demise.

Quiet enjoyment upon default.

Free from incumbrances.

Covenant for further assurance.

ther, that he the said A. B., and all and every persons and person whomsoever having or claiming, or who shall or may have or claim any estate, right, title, or interest in, to, or out of the said messuages, &c. hereinbefore demised, or intended so to be, shall and will at any time or times hereafter, upon every reasonable request of the said C. D., his executors, administrators, or assigns, but at the proper costs and charges of the said A. B., make, do, and execute, or cause or procure to be made, done, and executed, all and every such further, and other lawful and reasonable acts, deeds, assurances, matters and things whatsoever, for the more effectually bargaining, selling, demising and assuring the said messuages, &c. hereinbefore demised, or intended so to be, unto the said J. R., his executors, administrators, and assigns, for the residue and remainder which shall be then to come and unexpired of the said term of 500 years, (determinable as aforesaid,) in manner aforesaid, and according to the true intent and meaning of these presents, as by the said C. D., his executors, administrators, or assigns, or the said J. R., his executors, administrators, or assigns, or their or either of their counsel in the law, shall be reasonably advised or required; And moreover, that he the said A. B. shall and will at any time or times hereafter, (when thereunto requested by the said C. D., his executors, administrators, or assigns, and as often as there shall be occasion,) appear in person at some life insurance office or offices in the cities of London or Westminster, or before any agent or agents of such office or offices, and also procure and exhibit, or send or cause to be sent to such office or offices, or agent or agents, proper and satisfactory certificates, or other vouchers, of the birth, age, and state of health of him the said A. B., in order that the said C. D., his executors, administrators, or assigns, may insure any sums or sum of money upon the life of him the said A. B., and in case any such assurance shall be effected, and the said A. B. shall at any time thereafter change his usual place of abode, then that he the said A. B. shall forthwith give notice thereof to the said C. D., his executors, administrators, or assigns, specifying the place to which he shall so remove, and shall and will do, or cause to be done, all such other acts, matters, and things as shall be expedient and requisite for effecting and keeping on foot any such assurance or assurances as aforesaid; And if it shall happen that the said A. B. shall leave England, (except to Ireland,) by reason whereof any extra premium shall become

That the grantor will appear at a life assurance office.

payable on such assurance or assurances, then that he the said A. B. shall and will, as often as the same shall happen, pay unto the said C. D., his executors, administrators, or assigns, all such sum or sums of money as shall become due or payable for such extra premium, when and as often as the same shall become due. The grantor covenants to pay the extra premium in case he goes abroad.

And this indenture further witnesseth, and it is hereby agreed and declared between and by the said parties to these presents, that the judgment so to be entered up against the said A. B. as aforesaid, is intended to be a further security to the said C. D., his executors, administrators, and assigns, for the said annuity, or yearly rent, or sum of £100, and that no execution or executions shall be issued or taken out upon the said judgment until the said annuity, or yearly rent, or sum of £100, or some part thereof, shall be in arrear by the space of forty days next after the same shall become due and payable; and that as often as the said annuity, or yearly rent, or sum of £100, or any part thereof, shall be in arrear and unpaid by the space of forty days next after any of the said days or times whereon the same ought to be paid as aforesaid, then and in such case, and as often as the same shall happen, it shall be lawful for the said C. D., his executors, administrators, or assigns, to sue out any execution or executions upon or by virtue of the said judgment, as he or they shall think fit, for the recovery of any arrears of the said annuity, or yearly rent, or sum of £100, and all costs, charges, and expenses (if any) which he the said C. D., his executors, administrators, or assigns, or any of them, shall sustain or be put unto, for or by reason of the nonpayment thereof, or of any extra premium of assurance as aforesaid; And it is hereby agreed and declared that the said C. D., his executors, administrators, and assigns, shall by and with and out of the money to be raised by the means lastly aforesaid, pay, satisfy, and discharge the said annuity, or yearly rent, or sum of £100, and all arrears thereof, and all costs, charges, and expenses (if any) to be occasioned by the nonpayment thereof, and also any extra premium of assurance as aforesaid, and shall pay the surplus (if any) of the money so to be raised unto the said A. B., his executors, administrators, or assigns, for his and their own use and benefit; And it is hereby further agreed and declared between and by the said parties to these presents, that it shall not be necessary for the said C. D., his executors, administrators, or assigns, to revive, or cause to be revived, the said judgment, or do any other act or thing to

Execution not to be taken out upon judgment until default.

Not necessary to revive judgment or sue out scire facias.

keep the same on foot, notwithstanding the same judgment shall have been entered of record for the space of one year and upwards, nor shall it be necessary for him or them to sue out any writ of scire facias to assess damages, and that the said A. B., his executors or administrators, shall not, nor will take or attempt to take any advantage of the want of reviving or keeping the said judgment on foot, nor of the want of issuing out any scire facias as aforesaid, and that if he or they attempt so to do, by any action or legal proceedings whatsoever, this present agreement shall and may be pleaded and shown in bar thereto, any rule or practice of the Courts, or any of them, to the contrary thereof notwithstanding: Provided always, and it is hereby further agreed and declared between and by the said parties to these presents, that after the decease of the said A. B., and full payment to the said C. D., his executors, administrators, or assigns, of the said annuity, or yearly rent, or sum of £100, and all arrears thereof, up to the day of the decease of the said A. B., and all costs, charges, and expenses as aforesaid, the said C. D., his executors, administrators, or assigns, shall and will, at the request, costs and charges of the heirs, executors, or administrators of the said A. B., acknowledge satisfaction upon the judgment, or the record thereof, in due form of law, or do any other act or thing that may be required for vacating and discharging the said judgment. And this indenture moreover witnesseth, and the said C. D. doth for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree, to and with the said A. B., his executors, administrators, and assigns, by these presents, that in case the said A. B. shall at any time be minded or desirous of repurchasing the said annuity, or yearly rent, or sum of £100, and of such his intention shall give six calendar months' previous notice in writing to the said C. D., his executors, administrators, or assigns, or leave the same at his or their usual place of abode, or in lieu of such notice, shall pay or tender to him or them one half year's payment of the said annuity; Then that he the said C. D., his executors, administrators, or assigns, shall and will at any time after the expiration of the said six calendar months' notice to be given as aforesaid, or at the time of such payment or tender in lieu thereof as aforesaid, and on receiving of and from the said A. B., or his assigns, all and every sum and sums of money whatsoever which shall be then due for or on account of the arrears of the said annuity, or

Grantee to acknowledge satisfaction upon the death of the grantor and payment of arrears.

Proviso for redemption of annuity.

yearly rent, or sum of £100, and a proportionate part thereof, up to the day of repurchasing the same, and the sums of money which shall be then due on account of any costs, charges, and expenses occasioned by the nonpayment thereof, or for any extra premium of assurance as aforesaid, accept and take the sum of £800 of lawful money current in Great Britain, in full for the repurchase of the said annuity or yearly sum of £100, and the said C. D., his executors, administrators, or assigns, and the said J. R., his executors, administrators, or assigns, shall and will thereupon, at the request and at the costs and charges of the said A. B., release, assign, or otherwise dispose of the said annuity, or yearly rent, or sum of £100, and the said messuages, &c. hereinbefore demised, or intended so to be, and all other securities for the same, unto the said A. B., or such other person or persons as he shall in that behalf nominate and appoint, and acknowledge, or cause to be acknowledged, satisfaction of the said judgment, and do every other act and thing necessary or advisable for the releasing, assigning, vacating and discharging the said annuity, or yearly rent, or sum of £100, and the securities given for securing the same as aforesaid, as by the said A. B., his executors, administrators, or assigns, or his or their counsel in the law shall be reasonably advised and required. In witness, &c.

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